


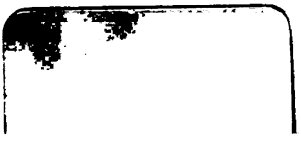

# CANADIAN CONSTITUTIONAL HISTORY AND LAW.

BY

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# PREFACE.

The present publication aims at presenting within moderate compass the fundamental principles of Canadian Constitutional History and Law. No other work combines the subjects contained in both parts of this book, although it seems fitting, from the intimate relationship which exists between Canadian Constitutional History and Canadian Constitutional Law, that the two subjects should be treated together. The condensed character of the treatise, too, when compared with other expositions of the subjects it comprises may perhaps commend the volume to some of its readers. Mr. John A. Rowland, B.A., has expended considerable pains in assuming charge of the preparation of Part I. of the book, and has placed that portion of the volume in its present form.

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### CANADIAN CONSTITUTIONAL HISTORY.



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# ADDENDA.

Page 118.—After note 6, add:—A Provincial (N.S.) Act (R. S. N. S. 5th ser. c. 80), providing for the winding up of companies in general, where a resolution to that effect was passed by the company, or where, at the instance of a contributor, the Court so ordered; and although no debts were due by the company, is *intra vires*. But such an Act could not be called into operation by a creditor. In re The Wallace Huestis Greystone Co., Russell's Eq. Rep. 461, 3 Cart. 374 (1881).

Page 146.—After note 17, add:—But the Provincial Attorney-General is the proper person to file an information respecting a nuisance caused by interference with a railway, such officer being considered as perpetually present in Provincial Courts asserting the rights of the Crown, and those under its protection, and seeking a remedy for the violation of the public rights in the Province, though such rights are created by Dominion enactment. The Attorney-General v. The Niagara Falls International Bridge Co., 20 Gr. 34, 1 Cart. 813 (1873).

In the former of these two cases, it was Held, that the bridge across the Niagara River was not a public nuisance but a matter within the competence of the Dominion Parliament; such body having passed an Act for the construction of the bridge in question. It was also held in the former case that the Courts of Ontario were powerless to grant relief extending beyond the limits of the Province. (See note 15, on page 124, ante.)

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# PART I.

# CANADIAN CONSTITUTIONAL HISTORY.

# PART I.

# CONSTITUTIONAL HISTORY.

## INTRODUCTION.

### CANADA FROM 1492 TO 1598.

The history of Canada may be said to begin in the year 1492, when, under the patronage of Ferdinand of Aragon and Isabella of Castile, Christopher Columbus sailed from the port of Palos, landed on an island of the Bahamas, and gave to Spain an empire in the western world. The fame of his discovery spread rapidly throughout the nations of Europe, and French and British were soon filled with the desire to share in the glory and gain which Spain was reaping through Columbus. In 1497, John Cabot, sailing under charter from Henry VII., reached the coast of Labrador; and in the following year his son, Sebastian, passed down the coast from Labrador to Florida, and claimed it in the name of England. France was the nation which ranked next in projects of discovery. In 1506, Denis of Honfleur visited the Gulf of St. Lawrence. In 1524, John Verrazzano sailed northward from the Carolina shore to the Gulf of St. Lawrence, and declared the region annexed to the French crown. And in 1534-5, Jacques Cartier entered the Gulf of St. Lawrence, and sailed up the

river of the same name to the site where now stands the City of Montreal. The old world powers were dividing the new world between them, and, owing partly to the superior ability and energy of her navigators, and partly to the fact that the attention of England was occupied at home, France was soon able to make good her hold on the northern portion of the continent.

It was from France that the first attempt at governing and colonizing the country came. In the year 1541 the French king, Francis I., appointed a nobleman of Picardy, the Sieur de Roberval, Governor of Canada and the surrounding regions. De Roberval reached Canada in the following year, and established a colony at Charlesbourg Royal. Winter came upon the unfortunate colonists and found them ill-prepared. Disease broke out, and more than fifty of the settlers died. The remainder were carried back to France in the following spring.

For the half century immediately succeeding de Roberval's failure, Canada was all but forgotten by France. Torn by her religious wars France could not afford to look beyond her own borders. It is true that for commercial purposes the connection between the two countries never ceased. The vessels of private merchants came regularly to Newfoundland to fish and trade in furs and skins; but nothing was done towards settling and governing Canada. As the century closed attention was again turned towards Canada. In 1598, the titles and privileges of de Roberval were transferred to a nobleman of Brittany, the Marquis de la Roche, by the French king, Henry IV. Henceforth we have a continuous line of trading companies and Royal Lieutenants operating in the country. It may be said, therefore, that with this event, the Constitutional History of Canada begins.

For purposes of convenience that history may be divided into four periods or divisions, as follows:

I. The period of the French Regime, lasting from

1598 till 1760, which may be sub-divided into (*a*), the period of government by Trading Companies, 1598-1663, and (*b*), the period during which Canada was governed as a Royal French Province, 1663-1760.

II. The period from the English conquest in 1760 to the granting of representative institutions in 1791, including—

(*a*) The period of British Military Rule, 1760-1763,

(*b*) The period covered by The Royal Proclamation, 1763-1774,

(*c*) The period covered by The Quebec Act, 1774-1791.

III. The period beginning with the Constitutional Act of 1791, and ending with the granting of responsible government by the Union Act of 1840.

IV. The period from the Union Act to the passing of the Act of British North America, 1840-1867.

In 1867, the British North America was passed, and the History of Canada subsequent to that time, considered from a constitutional point of view, has consisted in acquiring a proper comprehension of that enactment and in bringing other portions of Canada under its operation, rather than passing from one constitution and system of government to another.

Until 1867, the various systems of government in force from time to time in Canada strike one very forcibly as consisting of a series of constitutional experiments. The great difficulty which constitutional pioneers experienced, when we look back across the receding centuries, seems to us to have been that too limited an observation was taken of the circumstances of the people by their rulers. To please one section or class meant to incense another. Consequently, frequently the head that wore the crown lay very uneasily. In 1867, the "Fathers of the Confederation," as they are called,—

indicated, by the part they bore in confederating Canada, that they had surmounted the difficulties of their ancestors. Beyond the Province, they saw the Dominion; beyond the sect or party, they saw the nation; beyond the local interest they saw the subject of federal concern; and amidst discord and contention they saw tranquility and harmony. The confederation embraces not one Province, or party, or sect or race; it surrounds and includes all, and, as a statesman observed, "the foundations of confederation are laid deep in the hearts of Canadians, and its boundaries extend as wide as the ambitions of its people."

The British North America Act will be dealt with separately in the second part of this work.

# CHAPTER I.

## THE FRENCH REGIME, 1598-1760.

### 1. *Canada under Trading Companies, 1598-1663.*

The Constitutional History of Canada, as has been stated, begins with the patent granted in 1598 by Henry IV. to the Marquis de la Roche. De la Roche was created royal Lieutenant-Governor in Canada, Newfoundland, Labrador, Acadia, and the adjacent lands. His powers were most extensive. He was given authority,—1. To make "laws, statutes and political ordinances," and to enforce their observance when made. 2. To grant the lands he might acquire to nobles and others, to be held of the King in fiefs and seigniories, on condition that the grantees should serve in defence of the country; and to make similar grants to others of lower estate on such annual payments as he deemed proper. 3. To accept assistance from such merchants as cared to offer it, and none were allowed to traffic in the country without his express consent. In general, he was to have the same power and authority as King Francis had given to de Roberval. It was further provided that the profits of the expedition should be divided into three parts; one-third for de la Roche, one-third for his associates, and one-third for the government of the country.

The importance of this commission rests in the fact that it brings out clearly the attitude of the French Government towards Canada. The two chief objects aimed at were, the monopoly of trade, and the establishment in Canada of a colony based on the same social

arrangements as existed in France. To secure the first, the Governor was given power to say who should trade and who should not. To secure the second, provision was made that lands granted by him should be held in feudal-tenure.

The expedition of de la Roche ended in disaster, and it was some time before the French Government could repeat the experiment. The fifty years following were full of trouble for France, and she had little energy to spare for Canada. The settlement of the country was, of necessity, left to private enterprise. From 1598 to 1627, the control of trade and the direction of colonization were nominally vested in some French noble or other, with the title of Lieutenant-General. It really rested in the hands, now of two or three partners, now of a company, to whom was granted a monopoly of the trade, usually on condition of their doing something towards settling the country. For example, in 1599 the exclusive right to engage in the fur-trade of the St. Lawrence region, was given to a naval officer of Rouen, by the name, of Chauvin, and a trader of St. Malo, named Pontgravé ; and they undertook in return to establish a colony of five hundred souls. On the death of Chauvin, in 1603, a new company was formed with de Chastes, Governor of Dieppe, as Lieutenant-General. It was in this year that Champlain first came to Canada. De Chastes died a year later, and was succeeded by de Monts, who set about the work of establishing settlements with the support of a still larger company of merchants. The new company continued in charge until 1612. In 1607 the trading monopoly was suspended, but only for a time; it was re-granted in 1608. With this interval, the system already described seems to have been followed until 1627.

From the point of view of Canada, the policy was anything but a success. The trading companies did little for colonization. Their interests lay rather in the opposite

direction. Their objects were almost purely commercial. In 1612, there were only five French settlements in the land, and the French population did not exceed 300. The fur-trade had rapidly increased, and soon became an object of keen competition; and the power of granting the monopoly lay with the Lieutenant-General. Indeed it was because of this that the office was chiefly valued. In 1612, it was transferred to the Comte de Soissons, and after that it passed, by grant or purchase, from one magnate to another, with great rapidity. None of these came to Canada. They chose rather to make the best terms they could with the various merchant companies, while they themselves remained at home, and protected their interests at the French court against the machinations of their unsuccessful rivals. The functions of viceroy were in the meantime performed by a sort of deputy,—an office held by the great Champlain for a number of years, and under a succession of Governors.

Champlain's position resembled very much that of a commander of a garrison. He bore the title of Commandant. Not the least important of his functions was to protect the trading-stations, and secure the merchants in their monopoly. He was given power to appoint officers for the administration of justice and maintenance of police; to make peace or war with neighbouring tribes; to promote peaceable trade; to seize any whom he should find trafficking without leave, and send them to France for trial. He was instructed to extend the knowledge of the King's name and his authority, and "to lead the inhabitants to the light of the Catholic faith." In his efforts at exploration and settlement, he was seriously thwarted by two things: (1) the constant change of viceroys, which called him to France from time to time; and (2), the poor support which he received, and often the active opposition which he encountered, at the hands of the merchant companies. In 1621, the monopoly of trade was taken from the Associated

Merchants of St. Malo and Rouen, and given to the de Caens. These only made matters worse, and six years later things were altogether changed.

In 1624, Richelieu had been called to the Council of the French King, and had soon made himself supreme. His keen eyes were turned on Canada. He saw the importance of the country, the wealth of her fisheries and her commerce. He perceived the difficulties with which Champlain was wrestling, and that, as long as expeditions to Canada were dictated solely by individual profit, little good could be expected from them. He therefore resolved to establish a new system.

In the early colonial efforts of England and Holland one of two plans was followed. 1. A grant was made, conferring large political powers on some individual, who was left to arrange the government and trade of his new possession, — e. g., Pennsylvania, Maryland, etc. — or 2. A charter was granted to a company which was given commercial monopoly and political power,—e. g., London Company for Virginia, the English East India Co., etc. The latter was the favorite method, and the one with which Richelieu was most familiar. He decided to adopt it in Canada. Accordingly, in 1627, he abolished the office of viceroy, and the monopoly of the de Caens, and created the "Company of New France," or the "Company of the Hundred Associates."

The charter of Richelieu's Company began by declaring as its two main objects,—(1) the conversion of the natives, and (2), the creation of a commerce beneficial to France. It conferred upon the Company "full ownership, lordship and jurisdiction" in New France, with a perpetual monopoly of the fur-trade, and a fifteen years' monopoly of all other trade but that of the whale and cod-fisheries. The Company was required to send out 300 settlers within one year, 1,500 within ten years, and 6,000 within fifteen years. All settlers were to be Roman

Catholics, and three Jesuit priests were to be maintained in each settlement. The Government retained more control than formerly in each settlement. The Company could select their own Governor, but he had to be approved by the Government. His term of office was at first indefinite. After 1648, it was restricted to three years. The Company had power to grant lands and titles, but not to create baronies or higher degrees of nobility without the consent of the Crown.

In 1629, Quebec fell into the hands of the English, and was retained by them for three years. It was not until 1632, therefore, that the Company began operations. They retained their powers until 1663. The first Governor under the new regime was Champlain, who continued in office until his death on Christmas Day, 1635. He was succeeded by a number of Governors or Lieutenants-General, appointed by the King on the nomination of the Company.

The new policy was found to be but little superior to the old. During the first few years after the restoration of the country to France there was some degree of activity, but from 1645 to 1660, the colony remained stationary. The Company proved to be a purely commercial combination. The Governors with power of life and death, were but its representatives, and could follow no line of conduct except that prescribed to them. The importance of the period from a constitutional point of view consists in the fact that it marks (1), the beginning of the Ecclesiastical System, and (2), the first establishment of a Consultative Council.

The Consultative Council was a sort of advisory body which sprang up around the Governor. It first appears under the governorship of M. de Montmagny. Originally it consisted of the Governor, the Bishop (or the Superior of the Jesuits), and the local Governor of Montreal. In 1648 on the appointment of M. d'Ailleboust as Governor,

it was re-constituted to consist of the Governor, the Chief Ecclesiastic, the local Governor of Montreal, and the Syndics, (or municipal chiefs), of Montreal, Three Rivers and Quebec. It possessed powers, legislative, judicial and executive, in all affairs of the colony with appeal to the King alone. Henceforth its influence and authority gradually increased while that of the Company gradually decreased, and from about 1650 the Council was the real governing body in the country. It was the first political body in Canada.

The charter of Richelieu's Company had provided that none but Roman Catholic settlers should be brought to Canada, and that three priests should be maintained in each settlement. The reasons for the exclusion of the Huguenots were two. 1. The principle of toleration between men of different religious beliefs had not yet been learned, and the Government desired to avoid all possibility of religious strife in Canada. 2. The repeated rebellions of the Huguenots in recent years had brought them into strong disfavour, and rendered their very name an object of suspicion. The result of the provision was to create in Canada an Established Church.

The evangelization of Canada had already begun. In 1615, four priests of the order of Recollets had come to Quebec. The year 1625 witnessed what was practically the first appearance of the Jesuits in Canada. Almost from the moment of their arrival they became the central figures in the country. Their superior influence with the Crown enabled them to bring about the recall of the Recollets, their rivals, and from the date of the restoration of Canada to the French, the missions were entirely in their hands. The death of Champlain established them more firmly in their position. The Governor who acted from the death of Champlain till the arrival of Montmagny, received his appointment at the hands of the Jesuit Father. The document making the appointment had been

placed in his hands, with instructions to act upon it in case of emergency; and it was left to himself to say what was a case of emergency. Henceforth the influence of the Jesuits was felt, not only in things spiritual, but in things temporal as well. Montmagny was an ardent supporter of the Jesuits, and the head of the order was made a member of his council. In 1658, Laval was made Vicar-Apostolic of New France. Firmly convinced that the rulers of this world ought to be subject to the guidance and control of the Pope, none was better suited than he to assert the authority of the Church in things political. His extravagant claims and his interference in matters of state were bitterly resented by Argenson and Avaugour, and were the cause of many bitter quarrels between himself and those Governors,—quarrels which were not without influence in bringing about the change of government which took place in 1663.

The only rivals of the Jesuits were the Sulpician Fathers at Montreal. In 1640, the Company of New France had ceded "all right of ownership, lordship and justice" over the Island of Montreal to a company entitled "The Gentleman associated for the conversion of Savages at Montreal," and henceforth known as "The Society of Notre Dame de Montreal." In the course of three or four years, they had obtained the right of naming their own Governor, and of administering justice, subject however to an appeal from the Montreal Judges to the Governor of Quebec. The original plan of the Company had been to establish a hospital, college and seminary. The idea of the college and seminary was abandoned, but the hospital was duly erected. The colony suffered much from the attacks of the Iroquois, and as it did not flourish under its parent Company, the Company, in 1658, transferred all its rights to the Seminary of St. Sulpicius. The Seminary became a great feudal lord, and Montreal not infrequently the centre of opposition to the Jesuits of Quebec.

In 1663 the charter of the Company of New France was revoked, and Canada was brought under the immediate control of the French King. The career of the Company for past years showed their incapacity to direct the fortunes of a colony. In 1663, the total number of French in Canada did not exceed 2,500. The country was entirely abandoned to the attacks of the Indians. Champlain had allowed himself and the French to become involved in the war between the Hurons and the Iroquois, as the allies of the former. The Iroquois had proved the stronger. The Hurons had been almost annihilated, and the French settlement was in imminent danger of destruction. The presence of a military force was indispensable if the country was still to be inhabited by the white man. The Company did not feel equal to the necessities of the occasion. The membership had decreased from one hundred to forty-five. Those who remained felt that they had little to gain; that they possessed a continuance of responsibilities with little hope of individual benefit. It was decided to send Pierre Boucher to France to bring the desperate condition of the colony to the notice of the King, and to ask his assistance. On February the 24th, 1663, the Company met and resolved unanimously to abandon their charter and to restore to the King the property and lordship of New France. In the meantime the King had received the report of Boucher. He had also heard from Laval, who was then in France, an account of the bitter quarrels between himself and Avaugour. Accordingly, he determined to accept the Company's transfer, recalled Avaugour, and took Canada into his own immediate charge.

### 2. *Canada a Royal French Province, 1663-1760.*

Canada was now brought under the direct rule of the King, and the government was formed in its chief features, after the government of a French province. The administration of affairs was entrusted to a Governor, an

Intendant, and a Committee known at first as the Supreme, and later as the Superior, Council.

The Governor was usually a military noble of title, and sometimes of high rank. He had official precedence, and was regarded as the special representative of the King's person. Unlike the Governor of a French province, he was given substantial political power. The circumstances of the country demanded the presence of a military force. The Governor commanded the troops, and had complete charge of all military matters. He conducted relations with foreign colonies and Indian tribes, and had the power of making war and peace; and from his decision there was no appeal save to the King, and the King was three thousand miles distant.

The office of Intendant had gradually grown up in France during the sixteenth century. Originally the Intendants were mere temporary commissioners attached to the armies. Then they were sent to certain provinces to inquire into the collection of revenue and the administration of justice. From the time of Richelieu they became permanent officials in every province for the purpose of controlling the Governor, and they had gradually concentrated in themselves all the powers that had originally belonged to that official. In Canada the Intendant was virtually a spy upon the Governor. He was required to report to the King on all that took place in the colony. He was president of the Council, and so held the right to a casting vote. He controlled all expenditure of public money, and was clothed in his own person with independent legislative as well as judicial power. He was given authority, whenever he thought necessary, to issue ordinances having the force of law, and dealing with any subject; and "to order everything as he should see just and proper." He had power, if he saw fit, to call any cause before himself for judgment; and he judged exclusively in all

cases concerning the King, and in those involving the relations of seignior and vassal. He appointed subordinate judges, from whom there was an appeal to himself, and from his decision there was no appeal save to the King. These enormous powers were sometimes retrenched by contradictory instructions from the King. Indeed the Intendant was but the King's colonial man-of-all-work, and his powers were liable to be increased or diminished at his royal master's will.

The relations between the Governor and Intendant were not always of the most harmonious. It was not the intention of the French Government that they should be. The Intendant was intended to act as a sort of check upon the Governor, and so prevent the formation of anything like an independent principality in Canada. All that was necessary was to prevent their hostilities becoming so violent as to derange the machinery of government. The records of the time are filled with accounts of the quarrels that took place between them,—quarrels which redounded to the benefit of the Council. With each of these officials seeking for himself supporters among the councillors, the balance of power fell into the hands of the Council.

The Council, as at first constituted, consisted of the Governor, the Chief Ecclesiastic, and five councillors. The Intendant was soon added to form the ruling triumvirate. In 1675, the number of Councillors was increased to seven, and in 1703, to twelve. As a rule they were merchants and seigniors. Their selection originally rested with the Governor and the Bishop. The violent quarrels which soon broke out between the Bishop and the various Governors, and having their origin in the extravagant pretensions of Laval, not only made the continuance of this system of election impossible, but also seriously interfered with the transaction of public business, by dividing the Council into two hostile camps. In case of a vacancy, each sought to have his own supporter chosen. Accordingly,

in 1674, to obviate this difficulty of election, and to secure independence on the part of the councillors, the King took their appointment into his own hands. Even the name of the Council was changed in the course of time from that of "Sovereign," or "Supreme," to that of "Superior" Council.

The powers of the Council were both legislative and judicial.

1. It issued decrees for the civil, commercial and financial government of the colony.

2. It gave judgment in civil and criminal cases according to the royal ordinances and the Coutume de Paris. Its jurisdiction was both original and appellate. It had its own Attorney-General, who heard complaints and brought them before the tribunal if he thought necessary; and it acted as the highest Court of Appeal for the Province.

3. It exercised the function of registration, borrowed from the Parliament of Paris. In France, no royal edict had the force of law till entered upon the books of the Parliament of Paris. In Canada all edicts were required to be entered on the register of the Supreme Council at Quebec.

For purposes of administration of justice, Canada was divided into the three districts of Quebec, Three Rivers, and Montreal. To each of these districts was assigned a Judge appointed by the King, and to each of the Judges were added a Clerk and an Attorney-General under the supervision and control of the Attorney-General of the Superior Court, to which tribunal an appeal lay from all inferior jurisdictions. The judicial powers of these royal Judges, and of the Supreme Council were further supplemented by those of the Intendant already described, and those of the Seigniors to be referred to later. Added to all these tribunals was the Bishop's Court at Quebec, to try causes held to be within the province of the Church.

During the first few years of the new system of government, the work of settling Canada was carried on with activity. In 1663, the French population in the country was only 2,500; in 1679 it had reached 9,400. The cost of bringing out these colonists was borne by the French Government. Even after they had landed, large sums of money were spent to enable them to marry and bring up families. To relieve itself of this latter expense, and, at the same time, to secure the cultivation of the land by those it had brought out, the Government adopted the plan of conferring large grants of land on men of noble rank, to be held by them in fiefs and seigniories, and on the express condition that, if the land was not cultivated, it should be forfeited; and these, in turn, were empowered to sub-let to others of lower estate, on similar conditions.

The feudalism of Canada differed in many respects from that of France and Europe. (1) The requirement of military service by lord from vassal was, in Canada, unknown. (2) The relations between seignior and vassal were subject to constant intervention of the King. The "censitaire" was the especial ward of the Royal Council, which frequently interfered to modify the conditions of his tenure. (3) The Seignior was denied all voice in the direction of government, and of the privileges and prescriptions which still clung to the ancient ruling class in France, few were allowed to cross the Atlantic. The colony was far removed from France, and care had to be taken to prevent anything which might result in changes and revolutions, and, it might be, in the springing up of an independent principality.

The system was first established in Canada by Richelieu, and the first seigniory dates from 1634. Modified as it was, Canadian feudalism was made to serve double purpose: (1) to produce a faint and harmless reflection of French aristocracy; and (2) to furnish a simple and practical agency for distributing the land among the settlers, and securing its cultivation by them.

The Seignior was usually the immediate vassal of the Crown. He received his land gratuitously, and held it by the tenure of faith and homage. One condition was imposed upon him,—that of clearing his land within a limited time on pain of forfeiture. So large were the grants, that he could not clear it all himself. He was forced, therefore, to parcel it out to those who could. He could not sell, but must grant it upon condition of the payment of an annual rent. This brings us to the "censitaire."

The tenure "en censive," by which the censitaire held, consisted in a variety of obligations: (1) He had to make annual payments, known as "cens et rente,"—the amount of which fluctuated, and was fixed by agreement. (2) In case he sold his land, he had to pay one-twelfth of the purchase money to the Seignior. These payments were known as "lods et ventes," or mutation fines. (3) There were numerous other obligations, imposed partly by custom, partly by agreement, such as grinding his corn at the Seignior's mill, baking his bread in the Seignior's oven, etc., —conditions which were not enforced with much regularity but might be used for purposes of extortion.

The Seignior had also limited judicial powers. He exercised three kinds of justice: "high," dealing with crimes punishable by death (except murder and treason); "middle," referring to debts and misdemeanours punishable by fine; and "low," which concerned itself with seigniorial dues and profits. As a matter of practice, the Seignior's judicial powers were restricted to cases falling under the last of the three classes. In all matters of importance there was an appeal from his decision to the Royal Courts, and from them to the Superior Council. But the Seignior's Courts often proved useful in securing speedy redress in cases of minor importance, and in saving time, trouble, and expense to the disputants.

The beginnings of the ecclesiastical system in Canada have already been referred to. Laval, who was made Vicar-Apostolic in New France in 1658, and Bishop of Quebec in 1674, was really the father of the Canadian Church. He introduced the parochial system of old France into Canada, but with this modification. In France the parish-priest was a fixture in his parish and could only be removed for grave reasons. Laval demanded that the Canadian priest should be removable at the will of the Bishop—a demand which was repugnant to Louis XIV., and was bitterly opposed by Colbert, but which, nevertheless, was granted. To provide the funds necessary for his purposes, Laval introduced the payment of tithes,—at first, a thirteenth, and subsequently a twenty-sixth, of grains produced.

The education of the country was entirely in the hands of the ecclesiastics. Not only did Laval establish at Quebec a greater Seminary, where young men were trained for the priesthood, and a lesser Seminary where boys were trained in Latin and Rhetoric, in the hope that one day they would take orders; he also instituted a sort of industrial school for the training of a humbler class of pupils, in reading, writing, and the various mechanical arts. The funds for these, were derived from grants of land which he had acquired in the best parts of Canada. The purpose of the schools under the old regime was primarily religious, but the services which the church rendered to the state must not be under-estimated. More than anything else the Church contributed to the creation of an orderly and thrifty population in Canada. The money which she enacted was honestly and economically spent. Her income from the tithes was utterly inadequate to the maintenance of the clergy, and during the whole of the period a large part of the cost of their maintenance was contributed by the home government.

Such was the system under which Canada continued to be governed until its conquest by the English in 1760. It was characterized by paternalism, absolutism and centralization. "The King regards his Canadian subjects almost as his own children," wrote Colbert to Talon. Trade and commerce were continually vexed by the hand of authority. The Intendant visited from house to house, and domestic affairs of the most trivial importance were dealt with in his ordinances. The spirit of absolutism was everywhere apparent. It was held to be of great consequence that "the people should not be left at liberty to speak their minds." Public meetings were zealously restricted. Even a meeting of parishioners called to discuss the cost of a church required a special license. The whole system of administration centred in the King, who, in "the fullness of his power, and certain knowledge," was supposed to direct the whole machinery of government. Remember that for his information the King was dependent on the letters of the Governors and Intendants; that, when his time was occupied by more absorbing interests, he was thrown back upon abstracts of these letters, made by his Ministers, who might color as they saw fit; that ships from Canada did not arrive in France more than once or twice a year, and communication was of the rarest; and it is not difficult to see why Canada should be called the country of abuses.

With the passing of Canada to the English all this was changed, the French Government left few or no political traditions, but its influence still continued to be felt in two ways. (1) More than any other agency the Church of Rome had shaped the character and destinies of the infant colony; and, although the civil administration was shattered by the conquest the Church remained untouched. (2) The old laws and customs regarding property, continued to be observed, and were the cause of much discussion in succeeding years.

### 3. *The Beginning of Representative Government in Nova Scotia.*

Of all the Provinces in the present Dominion of Canada, Nova Scotia was the first to obtain representative government. Acadia, or Nova Scotia, was finally ceded to England by France in 1713, by the Treaty of Utrecht. The French-speaking and Catholic population of the Province was then about 3,000, and they were grouped in the four settlements of Annapolis, les Mines, Cobequid and Chignecto. Most of them wished to emigrate to Cape Breton, which was still a French possession. Their removal meant the loss of the Indian trade, and the English refused them permission to depart. To make their enforced residence as little of a hardship as possible, and to win their confidence, they were left untaxed. They were also granted a sort of representative local government. They were allowed to elect annually twenty-four deputies to act on their behalf, and to publish the orders of the Governor. These deputies had authority to act as arbitrators between the inhabitants, and from their decision an appeal lay to the Governor and Council. The new subjects were likewise given full religious liberty, and the existing ecclesiastical arrangements in the Province were continued. In spite of these concessions, the Acadians refused to take the oath of allegiance, or only gave such a qualified promise of allegiance that the British Government refused to accept it. In this conduct they were supported by their priests, many of whom were but the secret agents of France. They also objected to the enforcement of English law, and referred their disputes to their priests for settlement, rather than bring them before the English Governor or Council. Matters became serious, and in 1755, England, fearing an uprising in favor of France in the colony, resolved to expel the Acadians from the country.

In 1714, the year after the cession of Acadia, a Governor was appointed, with a commission conferring upon him the functions of Commander-in-Chief of the forces in the Island. In 1719, the Governor was instructed to "choose a Council for the management of the civil affairs of the Province, from among the principal English inhabitants.

In 1720, a Council of twelve was nominated. Owing to the small number of English inhabitants in the Province, all save one of these members were civil or military officers. The functions of the Council were chiefly administrative and judicial. It heard such appeals from the native deputies as the people cared to bring. The English population increased very slowly. In 1748, the English Government advertised for settlers, promising them grants of land, and holding out other inducements. About 3,800 settlers with their families accepted the offer. Captain Cornwallis, the new Governor, had charge of the expedition. His commission gave him power to nominate a Council, and other necessary officers. With the advice of the Council, he was to summon General Assemblies of the freeholders and planters, according to the usage observed in the other colonies in America; and with the advice and consent of such Council and Assembly, he could make laws, ordinances and statutes, not repugnant, but as near as may be agreeable to those of Great Britain. All such laws, etc., were to be transmitted within three months to the King for disallowance or approval. The Governor was given a negative voice in the making of all laws, statutes and ordinances. He was also authorized, with the advice and consent of the Council, to establish Courts of Justice; and he was made military Commander-in-Chief.

During the three or four years following the expedition of Captain Cornwallis, a large number of German and and Swiss settlers were brought over to the country. With so heterogeneous and troublesome a body of settlers, the

Governor hesitated to call an Assembly. The question was raised in 1755, whether the Governor and Council by themselves had any legislative authority. Attorney-General Murray (afterwards Lord Mansfield), gave it as his opinion that "the Governor and Council alone were not authorized to make laws till there should be an Assembly." The Governor was ordered to call an Assembly. He replied that it was impossible to do so under existing circumstances. The Board of Trade refused to accept any excuse. In 1757, the Council formulated a plan for the election of an Assembly of twenty-two members. An election was held, and the first Assembly of Nova Scotia met at Halifax on the 2nd of October, 1758.

# CHAPTER II.

## FROM THE ENGLISH CONQUEST TO THE GRANTING OF REPRESENTATIVE GOVERNMENT, (1760-1791.)

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### 1. *Canada under British Military Rule, 1760-1763.*

Although Canada was not formally ceded to Great Britain till the signing of the Treaty of Paris in 1763, the government of the country by England really began about three years before that date. The capitulation of Quebec took place on the 18th of September, 1759; that of Montreal followed on the 8th of September, 1760. In the articles of capitulation two points are to be noted:—(1) The inhabitants were secured in the peaceable possession of the houses, goods, effects and privileges. (2) The free exercise of the Roman Catholic religion was granted; and all the communities, and all the priests, were guaranteed the possession of their goods, constitutions and privileges. A similar request with regard to the Jesuits, Recollets, and Sulpicians, was refused until the pleasure of the King should be known. A similar reservation was made with respect to the parochial clergy's tithes.

In the meantime, and until the possession of Canada should be settled, some form of government had to be established. General Amherst lost no time in undertaking the task. Canada was divided into the three districts of Quebec, Montreal, and Three Rivers, corresponding to the old divisions under the French regime. General Gage was

appointed Governor of Montreal; Colonel Burton, of Three Rivers; and General Murray of Quebec. Military Councils were established to administer law. Civil differences of the inhabitants were to be settled, according to their own laws, by captains of militia, who were to retain authority in their parishes. An appeal lay from their decision to the commanding officer of the district, and from him to the Governor assisted by a council of captains. Criminal offences were to be dealt with by a court of military officers, and under military law. The proceedings in their courts were simple and free from technicality, and followed, as far as possible, the laws and ancient customs of the colony.

This period of Canadian history is known as the "règue militaire." The name, although an accurate description of the situation in which matters stood, is apt to be misleading. It is too often held to mean a military despotism. The courts had nothing of the military element but the name. The rights and feelings of the inhabitants were in every way respected. The greatest care was taken to conduct the government in accordance with the old laws and customs of the Province, and no attempt was made to introduce English laws. The one desire was to provide for the well-being of the people, and to render justice between man and man. The free exercise of the Roman Catholic religion was permitted, and the ecclesiastics were treated with every respect and consideration. The French were not insensible to the treatment they received. In an address to Governor Gage in 1760, they referred to "the protection they had received and the peace and prosperity they enjoyed under the new government." "The General who conquered us," they said, "has treated us as a father rather than as a vanquisher." We are told that "the Canadians dreaded nothing so much as the return of the French."

The Treaty of Paris was signed on February the 10th, 1763. Its effect, for our present purposes, may be briefly indicated. (1) France ceded to Great Britain "Canada and all its dependencies," Cape Breton, and all other islands in the Gulf and River St. Lawrence, and renounced all pretensions to Nova Scotia, or Acadia, in all its parts. (2) France received the islands of St. Pierre and Miquelon, to serve as a shelter for French fishermen; the right of fishing on part of the coasts of Newfoundland, as specified in Article XIII. of the Treaty of Utrecht, in the Gulf of St. Lawrence at a distance of three leagues from all coasts belonging to Great Britain, and out of the said Gulf, but not within fifteen leagues of Cape Breton. (3) The inhabitants of Canada were to be allowed the free exercise of the Catholic religion, and the liberty to worship according to the rites of the Romish Church "as far as the laws of Great Britain permit." No reference was made to the laws that were to prevail throughout the conquered country.

The treaty was followed, on the 7th of October, 1763, by a proclamation of the King, George III., establishing in the newly acquired territory in America four new governments,—of which Quebec was one,—and making provision for the government of the same; and on the 21st of November in the same year, General Murray was appointed Governor of Quebec.

### 2. *Canada under the Royal Proclamation, 1763-1774.*

The proclamation began by setting out the boundaries of the various governments. Anticosti and Magdalen Islands were placed under the care of the Governor of Newfoundland; and the islands of St. John (Prince Edward Island) and Cape Breton, with the smaller adjacent islands, were annexed to the Government of Nova Scotia. It then proceeded to empower the Governors of these colonies,—(1) to summon General Assemblies, with the advice and

consent of His Majesty's Council, "so soon as the state and circumstances of the colonies would admit thereof," and in the same manner as was usual in those colonies which were under the King's immediate government; (2) with the consent of the Councils and representatives of the people so to be summoned, "to make statutes, laws and ordinances for the peace, welfare and good government of the colonies; (3) to establish, with the consent of the Councils, courts of justice for the hearing and determining of civil and criminal causes, according to law and equity, and, as near as may be, agreeable to the laws of England, with an appeal in civil cases to the Privy Council. The Governors and Councils were further authorized to grant lands to the inhabitants as they thought proper, and were directed to reward with lands such military men as had served in the late war, and were actually residing in Canada, and should make application for the same. The Indian tribes were taken under the protection of the government, and orders were given that they should, on no pretence, be molested or disturbed in the possession of the lands reserved to them. Private persons were forbidden to purchase from the Indians lands so reserved, and none were to be allowed to trade with them without leave and licence from the Governor for such purpose.

As already stated, General Murray was appointed Governor of Quebec on November 21st, 1763. He was commanded to execute the duties of the office according to his commission and accompanying instructions, or such other instructions as he should receive under His Majesty's seal, and according to such reasonable laws as he should make with the advice and consent of the Council and Assembly. The Assembly was to be summoned as soon as the circumstances of the colony should admit. The members were to be elected by a major part of the freeholders in their respective parishes, and, before taking their seats, they had to take the oath of allegiance and supremacy, and

the declaration against transubstantiation. The commission then went on to assign to General Murray the same powers as to legislation, the establishment of courts of justice, etc., as had been given to the Colonial Governors generally in the Royal Proclamation.

Although provision was made for the calling of a Representative Assembly in the Province, no Assembly ever met. The nature of the test oath, to which the members were to be subjected, practically operated as an exclusion of all French-Canadians. To call an exclusively Protestant Assembly would have been inadvisable and almost impossible. The Protestants in the country did not number over 300 or 400; the French-Canadian population was about 70,000 or 80,000. Accordingly, the government was carried on solely by the Governor-General, assisted by an Executive Council, composed of the Lieutenant-Governors of Montreal and Three Rivers, the Chief Justice, the Surveyor-General, and eight others chosen from the residents of the colony.

During this period (from 1763 to 1774), the Province was in a very unsettled state owing to the uncertainty that prevailed as to the laws actually in force. No Assembly had been called to enact legislation. The Treaty of Paris had not made any reference to this subject. The Proclamation of 1763 was so vague that no one knew exactly what it meant. Conflicting opinions were held on the matter. Some said that the English law was in force in its entirety, or, at least, in the same degree as in other colonies; and that it was introduced by the Proclamation and subsequent commission. The King, they argued, could, by right of conquest, establish any laws he pleased, and his Proclamation really operated as a repeal of the existing law in Canada, and an establishment of English laws in their stead. Others maintained that the old French-Canadian laws were still in force. Conquest, they said, did not operate to change the existing laws of a

country except in so far as was necessary to secure the sovereign rights of the conqueror. The laws of Canada had never been repealed, nor had the laws of England been expressly introduced. Provision had been made for the enacting of new laws in Canada, but the provision had never been carried out; and so the old laws were still in force. A third view was, that the Proclamation kept the civil law of Canada but introduced the criminal law of England. The exponents of this doctrine contended that the criminal law of England was a part of the law of the Empire, and was, by implication, introduced into every country that passed under the control of the British Crown. In their uncertainty men followed, pretty much, whatever laws they chose, and dissatisfaction was felt on all sides.[1]

Something had to be done to remove the uncertainty and establish a uniform system of law throughout the Province. The English inhabitants knew nothing of French, and their ignorance of the law, in common with the language, led them to look upon it with dislike. On the other hand, among the higher classes of the French-Canadians at least, there was considerable opposition to the introduction of English law. As the possessors of seigniorial privileges they had enjoyed a position of dignity and profit under the French rule, and they were naturally averse to any change, the result of which they could not foresee. The humbler portion, perhaps, felt no particular interest in the point, and were ready quietly to accept the decision of their rulers. There were other considerations. The old laws and customs in Canada had prevailed for a century and a half, and were familiar to the vast majority of the population. The laws of tenure of property, of

[1] The validity and effect of this Proclamation was discussed in the case of Campbell v. Hall, which decided that it formed the constitution of Canada during the years 1763-1774. The judgment was given by Lord Mansfield, and is reproduced in Mr. Houston's work on "Canadian Constitutional Documents," at page 79.

descent, of alienation, etc., followed in a known groove, and there could be no mistake as to what they were. To arbitrarily set them aside would cause much confusion and embarrassment. With the English law it was not so. Scattered as it was through a mass of books, with much of it obsolete, and much amended, few, or none, even among the English inhabitants themselves, knew what it was. Much of it, moreover, was technical and unsuited to the circumstances of the new country. With regard to criminal law the case was different. The general population were soon made to understand the merciful character of the English criminal law, and its introduction was willingly accepted by all parties.

A second question demanding settlement, was that of the House of Assembly. Provision had been made in the Royal Proclamation for the calling of a Representative Assembly, but, for reasons already indicated, no Assembly had ever been called. Nevertheless demands for an Assembly continued to go up from the English inhabitants. Their object seemed to have been to get the government of the country into their own hands. They did not, or would not, see the absurdity of an exclusively Protestant Assembly in a country where the Catholics outnumbered the Protestants by about two hundred to one. The admission of Roman Catholics would have defeated the very object they hoped to attain, and would have aroused opposition both in America and in England. There is little reason to believe that the French-Canadians desired an Assembly, and they naturally refused to join in the demand for one from which they would practically be debarred, by the religious tests to which its members were likely to be subjected.

The religious situation of the Province also demanded attention. The toleration guaranteed by the articles of capitulation had never been defined. The Treaty of Paris gave no positive assurance on the matter. Everywhere

there was a feeling of uncertainty as to the policy likely to be observed in the future. To a people so strongly attached to their religion as the French-Canadians the question was one of great importance. The existing uncertainty was accompanied by a feeling of disquietude and discontent, and cried out for removal.

The natural difficulties of the situation were increased by the lack of forbearance shown on all sides. The present government was felt to be but temporary. The Proclamation was treated more as an assertion of authority, than an affirmation of the form of rule. Sooner or later it must be changed. What the new form of government would be, remained to be seen. In the meantime, the various sections of the population devoted all their energies to securing the prevalence of those opinions which each desired to see enforced, and gave but little thought to the justice or injustice of their claims. Petition after petition was sent to London. At length, in the session of 1774, a bill was introduced into the English House of Commons, and passed. It was the "Quebec Act."

The clauses of the Proclamation referring to the Indians deserved notice. For some time there had been a growing feeling of discontent among the Indians, arising from settlement upon their lands by the white man. In many instances these settlements were made under deeds obtained from the Indians while drunk, or signed by parties having no authority to sign. The "enormous and unrighteously obtained patents of their land" formed a subject of constant complaint. The belief soon spread that the British were seeking to deprive them of their hunting grounds; and the enemies of Great Britain did what they could to strengthen this belief. The interests of the country demanded that the hostility of the Indians should not be recklessly incurred. The government saw that some measures must be taken to protect them, if their friendship was to be retained. Accordingly they enacted;—(1) that the Governors should grant no warrants of survey

beyond their respective governments; (2) that no private man should be allowed to purchase land from the Indians except through the intervention of the government. These provisions encountered much opposition at the time, but the principle then laid down, has always been followed since.[2]

### 3. *Canada under the Quebec Act, 1774-1791.*

The Quebec Act begins by extending the boundaries of the Province of Quebec, and by declaring null and void, from the 1st of May, 1775, the provisions relating to the civil government of the Province, contained in the Royal Proclamation, Governors' commissions, etc. It then proceeded to deal with the three questions referred to above;

I. It recited the inexpediency of calling an Assembly in the present condition of the Province, and established a Council, composed of not less than 17, and not more than 23 members, resident in the country, to be appointed by the Crown, with the advice of the Privy Council, and having power to make ordinances for the peace, welfare and good government of the Province, with the consent of the Governor; but the Council was not empowered to make assessments for taxes, other than the inhabitants would themselves impose for municipal purposes.[3] Ordinances made were to be transmitted within six months to His

[2] The nature of the Indian title to lands is discussed in the case of "St. Catharines Milling and Lumber Company v. The Queen, 14 A. C. 46. The case was carried through all the Courts up to the Privy Council. It establishes two propositions: (1) That the tenure of the Indians was only a personal right, depending on the good-will of the Sovereign. (2) That the Crown had all along a present proprietary estate in the land, upon which the Indian title was a mere burden.

[3] A supplementary Act was passed in 1774 (14 Geo. III., c. 88), which established a fund for defraying expenses of administration of justice and civil government, by imposing duties on spirits and molasses. See Houston's "Constitutional Documents," at page 99.

Majesty for approval or disallowance; and no ordinance touching religion, was to come into force without His Majesty's consent.

The Governor already had the assistance of a Council for executive purpose, but, under the terms of his commission, legislation had been reserved for the consent, along with the Council, of a Representative Assembly. The function of legislation was now entrusted to a nominated Council. There was practically no other course open to the government. To establish an Assembly composed entirely of Protestants would have been absurd, owing to their vast numerical inferiority in the Province. To remove the bar and admit Roman Catholics, meant that the Assembly would be exclusively Catholic. The Protestant feeling of England was so strong that no one dared to propose such a measure. Besides, it was doubtful policy, so soon after the conquest, to place so much power in the hands of an elective French Assembly.

II. As to the Church, the Act gave Roman Catholics the right to the free exercise of their religion, and permitted their clergy to hold, receive, and enjoy their accustomed dues and rights, "with respect to persons professing that creed." A clause was added making it lawful to provide out of the rest of the dues for the encouragement of the Protestant religion, and the support of the Protestant clergy.

The idea was to retain the provincial endowment of religion, but to cause it to be employed for whatever church the people chose. All tithes from Catholics were to go to Catholic priests. The number of Protestant tithe-payers was so small, that, as yet, no specific provision needed to be made regarding their tithes. Some objection was raised to this recognition of Catholicism, but it must be remembered that religious toleration had been guaranteed to the Catholics by the articles of capitulation; and that to the policy here adopted, was due the

support given by the Catholic clergy to the English rule during the years 1775-6. The principle of the state endowment of religion was in those days generally accepted, and no opposition to the clause was encountered on that score.

III. As to the question of law,—it enacted that in all controversies relative to property and civil rights, resort should be had to the laws of Canada (i.e., the old French civil law), as the rule for the decision of the same, while the English criminal law was to be enforced, to the exclusion of every other criminal code which might have prevailed before 1764; but both the civil and criminal law might be amended by ordinances of the Governor and Council. Property owners, however, were allowed to devise the property by will, to be executed according to either the laws of England or those of Canada.

This part of the Act met with some opposition, but it is to be observed that no one advocated the wholesale introduction of English law. Even Masères, the Attorney-General of the Province, and the representative of the English party, advocated the retention of the French laws relating to tenure, inheritance, dower, alienation, and encumbrance of land, and the distribution of the effects of intestates,—the law of tenure, because promised by the articles of capitulation; the others, because their abolition would have caused so much confusion. The question was entirely one of degree. How much of the old law should be allowed to remain? The English party seemed to be anxious for two things: (1) arrest for debt; (2) the right to a jury in civil cases. Masères was not inclined to favor the first, and it was scarcely referred to in the debates on the bill. The second was rather distasteful to the French-Canadians. The jury was an institution to which they were unused, and in which they were inclined to place little confidence. The seigniors were unwilling to have their suit submitted to juries composed in part of their inferiors; the inferiors did not wish the trouble of attendance.

The policy of this part of the Act may admit of argument. One thing it did. By preserving to the French-Canadians that part of the old law which they most desired, it secured for England their support during the years of the American Revolution. Its ulterior effect has been, to maintain a large population of small peasant landholders throughout the Province of Quebec, and to preserve the French-Canadian character unchanged.

The Act further provided that Roman Catholics should be no longer obliged to take the test oath, but only the oath of allegiance, and gave the French-Canadians additional assurance that they would be secured in the rights guaranteed them by the articles of capitulation and the Treaty of Paris. It was to come into operation on the 1st of May, 1775.

The new constitution was inaugurated by Sir Guy Carleton, afterwards Lord Dorchester. He nominated a Legislative Council of twenty-three members, which met for the first time on the 17th of August, 1775. It was the period of the American War of Independence, and the session was abruptly terminated by a report that the troops of Congress had appeared in Canada. The Council did not meet during 1776, and it was not until the spring of 1777 that the second session was held. In the meantime an important addition had been made to the constitutional machinery of the Province. On the 8th of August, 1776, in accordance with the royal instructions accompanying his commission, the Governor-General had called to his assistance a committee of five members of the Legislative Council for the despatch of public business, but without authority to enact legislation,—a proceeding which aroused the anger of Chief Justice Livius who seriously questioned its legality, but which was justified, to a certain extent, by the trying circumstances in which the country was then placed. This committee gradually came to be the executive branch of the government, and formed a regular State

Council. Its full importance was not recognised for many years. It was, in short, the beginning of the cabinet system.

Although the Quebec Act offered perhaps the best practical solution of the problems that presented themselves in 1774, difficulties soon arose which led to its repeal in 1791.

(1) The old dispute as to the introduction of English law was revived. As a consequence, in 1784, the Home Government directed the Legislative Council to issue an ordinance establishing the law of Habeas Corpus, and in 1785, an ordinance was passed introducing a modified system of trial by jury in civil cases. Notwithstanding the provisions of the Quebec Act, in their commercial transactions, the English merchants continued to follow the forms of English law. Even in the courts there was the same divergence of practice. In 1786, William Smith was made Chief-Justice of the Province. In one of the first cases brought before him he reversed the decision of the Common Pleas, and held that the effect of the Quebec Act was not to introduce either system of law to the exclusion of the other. In cases where French law would apply, he said, it should be followed in accordance with the provisions of that Act. On the other hand, where the litigants were purely English, they might have recourse to English law. No one seemed to know what laws were in force under the Act. No certainty existed in matters of litigation except in the case of landed property, where the Custom of Paris was quite clear. Complaints were heard on all sides regarding the administration of justice. In 1787, a commission was appointed to investigate the matter. The investigation led to no immediate result, but the evidence brought forward showed the great uncertainty that existed as to the prevailing law,—French or English law being followed as equity suggested. The result was a condition of legal anarchy and confusion.

(2) The Legislative Council failed to satisfy the Eng-

lish inhabitants of the Province. One objection they had to it was, that it imposed a limit on the ambition of those desiring to enter public life. They wanted a more popular system of government, and the demand for a Representative Assembly continued to form a part of the numerous petitions which went up to the Home Government during these years. The demand found some support even among the French, who hoped to find in a French Assembly a security for French law and the Church, which they could not find in the Legislative Council.

(3) Perhaps the most important fact of the period in this connection, was the settlement in the country of the United Empire Loyalists. From the close of the War of Independence they continued to arrive in ever increasing numbers, and at the time of the Constitutional Act, they were estimated at about 40,000. Many settled in Nova Scotia and New Brunswick. Many pushed their way up the St. Lawrence, and established themselves along the shores of Lake Ontario, where they laid the foundations of the future province of the same name. Accustomed as they had been to representative institutions in their old home, they naturally desired the same in the new. The Quebec Act, by extending the boundaries of the Province, had brought the whole of this district under the operation of the French civil law;[4] but the conditions which made the retention of French law along the lower St. Lawrence necessary did not exist here. On the 11th of April, 1785, the new settlers presented a petition in London praying that the country west of the river Beaudette be incorporated into a separate district, with "the blessings of British laws, and of British Government, and an exemption from French tenure." The inhabitants of this section of the country were nearly all British. The injustice of

[4] Mr. Kingsford makes this his chief criticism of the Act. Expediency demanded the introduction into the country of English jurisprudence as far as possible, and all this then unsettled territory should have been expressly excepted from the operation of French law.

subjecting them to French law was soon evident, and the necessity of placing them under conditions differing from those of Eastern Canada, as a matter of policy, early became apparent.

In consequence of the continued agitation against the Quebec Act, and the numerous petitions that arrived from Canada demanding its repeal, the Home Government again resolved to intervene. In the lower part of the Province the population was almost entirely French, accustomed to French laws and French institutions; and the agitation there was practically confined to the English-speaking minority. The settlements along the Upper St. Lawrence and Lake Ontario, were composed entirely of United Empire Loyalists. To bring all under a uniform system of law and government seemed impossible. Edmund Burke thought that to attempt to amalgamate two populations so diverse in language, laws and customs, was a complete absurdity. It was therefore determined to divide the country into two Provinces, on the lines indicated in the Loyalist petition of 1785; to give to each a Representative Assembly of its own, and leave it to settle for itself what laws and customs it wished to observe; and to allow each to work out its own destiny without interference from the other. Moreover, their recent experience with the American colonies had led English statesmen to believe that it might be as well to have in Canada two colonies, jealous and watchful of each other, and so prevent the possibility of any united effort, which might result in a repetition of the American revolution. Accordingly, on March 7th, 1791, a bill to that effect was introduced into the House of Commons by Mr. Pitt. The proposed division of Canada encountered considerable opposition. Mr. Lymburne, a merchant of Quebec, who was in London representing the interests of the English-speaking inhabitants of "Lower" Canada, strongly objected to the "violent measure" of creating two distinct Provinces. After much discussion Mr. Pitt's bill passed the House, and the "Canada Act," or "Constitutional Act," became law.

4. *The Maritime Provinces.*

The establishment of representative government in Nova Scotia has already been described. At that time, Nova Scotia included, not only the present Province of Nova Scotia, but also the present Province of New Brunswick. By the Treaty of Paris, in 1763, Prince Edward Island and Cape Breton were ceded to Great Britain, and by the Royal Proclamation of the same year, both were annexed to the Government of Nova Scotia.

In 1769, Prince Edward Island was made a separate Province, and Mr. Walter Paterson was made Captain-General and Governor-in-Chief over the Island. The terms of his commission were substantially the same as those of the commission given to Governor Cornwallis of Nova Scotia in 1749. In 1784, owing chiefly to the influx of United Empire Loyalists from the United States,[5] Nova Scotia was divided, and the present Province of New Brunswick was created. Mr. Thomas Carleton was the first Governor, and his commission was virtually identical with those of Governors Cornwallis and Paterson, of Nova Scotia and Prince Edward Island respectively. In 1786, Lord Dorchester became Governor-General of Canada, and it may be noted that his appointment extended to the other Provinces as well. He received separate commissions as Governor-in-Chief, not only of Canada but of Nova Scotia and New Brunswick.

In 1784, Cape Breton was erected into a quasi-independent Province, with a Lieutenant-Governor and Council. In 1820, it was re-united with Nova Scotia, and given a representation of two members in the Nova Scotia Assembly.

[5] These United Empire Loyalists settled in what became the City of St. John. They asked to be represented in the Nova Scotia Assembly. This was denied them, and they then asked to have their territory set apart as a separate district, with representative institutions. This was done in 1784.

## CHAPTER III.

## CANADA UNDER THE CONSTITUTIONAL ACT, 1792-1840.

### 1. *The Struggle for Responsible Government in the Two Canada's.*

The avowed object of the Constitutional Act was "to assimilate the constitution of Canada to that of Great Britain, as nearly as the differences arising from the manners of the people, and from the present situation of the Province would admit." It therefore repealed so much of the Quebec Act as related to the appointment of a Council for Quebec, and to that Council's powers, and divided the country into the two Provinces of Upper and Lower Canada, giving to each a Governor, Legislative Council, and House of Assembly, corresponding roughly to the King's Lords and Commons in England. The Governor was assisted by a strong but anomolous body called the executive council. The origin of this body has already been described. Its powers, though vague, were extensive. Its members, who acted as his advisory board, were occupants of the highest official positions in the country, were usually members of the Legislative Council, and, once appointed, were practically without responsibility for their acts. It was to the arrogance of this Executive Council, that much of the bitterness of the struggle for Responsible Government was directly traceable.

The Legislative Council was mixed up with the Executive Council in a most confusing way. Its members were chosen by the Crown, and for life, and were responsible only to the Crown. In Upper Canada they numbered not less than seven; in Lower Canada not less than fifteen.

They must be British subjects by birth or naturalization,[1] or have become such by the conquest and cession of Canada; and they were required to be of the age of twenty-one years. It had originally been proposed to make the office of Councillor hereditary. The idea was abandoned, but a provision was inserted in the Act reserving to the King the power, should he think fit, of annexing to hereditary titles of honor the right of being summoned to the Legislative Council. The object was to create a political aristocracy in Canada. It may be noted that no such titles were ever conferred under the authority of the Act. The Speaker of the Council was to be appointed by the Crown.

The members of the Assembly were elected by the people for a definite period, and were responsible to the people for their conduct in office. In Upper Canada they numbered not less than sixteen; in Lower Canada, not less than fifty. The limits of districts returning representatives, and the number of representatives to each, were fixed by the Governor-General. The county members were elected by owners of lands in freehold, or in fief or roture, of the yearly value of forty shillings sterling or upwards, over and above all rents and charges payable out of the same. The members for towns or townships were chosen by persons having a dwelling-house and lot therein, of the yearly value of five pounds sterling; or who had resided in the town or township for a year next preceding the election, and paid one year's rent for the dwelling-house in which he resided, at the rate of ten pounds sterling or upwards, per annum. The Governor could summon, prorogue or dissolve the Legislature whenever he deemed it expedient; but it was to meet at least once a year, and each Assembly was to

[1] By section 4 of the Constitutional Act, naturalization required to be by Act of the British Parliament. The Constitutional Act Amendment Act of 1830 altered that as regards Lower Canada, and made naturalization by Act of the Council and Assembly of Lower Canada sufficient, provided that no such act was to be operative till His Majesty's assent should have been given.

continue for four years, unless sooner dissolved. It was further provided that no clergyman or Legislative Councillor should be a member of the Assembly.

The making of laws rested with the Assembly and Legislative Council, but no bill became law till it had received the assent of the Governor. The Governor had power, not only to give or withhold his assent to any bill, but also, in case of doubt, to reserve any bill for the signification of his Majesty's pleasure; and such bill was to have no effect till his Majesty's assent should be communicated to the Council and Assembly. He was also required to transmit copies of all bills, to which he had assented, to the Secretary of State, and they might be disallowed by the King at any time within two years from their receipt.

The British Parliament retained the right of establishing regulations, imposing, levying and collecting duties, for the regulation of navigation and commerce between the two Provinces, or between either of them and any other country, but the apportionment of moneys raised, was left to the Legislatures of the Provinces.[2] This right had already been reserved to the Imperial Parliament by the Colonial Tax Repeal Act of 1778 (18 Geo. III., cap. 12), and this section merely continued that Act in force. It was also provided that all public functionaries, including the Governor-General, should be appointed by the Crown, and removable at the royal pleasure.

The provisions of the Quebec Act, respecting the free exercise of the Roman Catholic religion, and the clergy of the Church of Rome, was left unchanged. The King was

[2]Disputes soon arose respecting the division of the revenue arising from customs on the St. Lawrence. In 1817, it was agreed that one-fifth of the duties collected in Lower Canada should go to Upper Canada, and this was ratified by the legislatures of both Provinces in the following year. The Lower Canada statute expired in 1819 and the Assembly refused to renew it. The British Parliament interfered, and passed the Canada Trade Act (3 Geo. IV., 119), which made the agreement permanent.

to have the right to set apart, for the use of the Protestant clergy in the colony, a seventh part of all uncleared Crown-lands. The Governor might also be authorized, with the advice of his Executive Council, to erect parsonages and endow them, and, of himself, to present thereto incumbents or ministers of the Church of England. The provision respecting the allotment of lands for the support of a Protestant clergy, etc., might be varied or amended by an Act of the Legislature of the Province, but no such Act could be assented to by the King until thirty days after it had been laid before both houses of the Imperial Parliament.

The lands to be granted in Upper Canada were to be held in free and common socage, and persons already holding lands there on any other tenure, might receive fresh grants without prejudice to any existing rights or titles. Grantees in Lower Canada might also receive their land in free and common socage, if they so desired.

The Governor and Executive Council were to remain a Court of Appeals until the Legislatures of the Provinces should make other provisions, and it was also enacted, that during the interval which might elapse between the commencement of the Act, and the first meetings of the Legislature of each Province, the power of making temporary laws should rest with the same authorities.

The bill became law on the 14th of March, 1791. Lord Dorchester, the Governor-General, being absent in England, the duty of carrying out the provisions of the Act devolved upon Sir Alured Clarke. The instructions to establish the separate Provinces of Upper and Lower Canada were delivered to him on the 11th of November, by Lieutenant-Colonel Simcoe, the new Lieutenant-Governor of Upper Canada. Clarke himself was made Lieutenant-Governor of Lower Canada. On the 18th of November a proclamation was issued fixing December the 26th as the day when the division of the Province should take effect. The Ottawa River was named as the boundary line between

the Provinces, in accordance with the terms of an order of the King in Council, dated the previous 24th of August. The population of Lower Canada at the time of division was about 125,000; that of Upper Canada less than 20,000.

On the 7th of May, 1792, Lower Canada was divided into fifty electoral districts, returning fifty representatives; and the first Legislature of that Province met at Quebec on the 17th of December, in the same year. The Legislative Council consisted of fifteen members. A Frenchman was elected speaker of the Assembly, and a resolution was passed requiring the use of both the French and English languages in debate, and in the Reports of the House. The Parliament of Upper Canada,—with a Legislative Council of seven members, and an Assembly of sixteen,—met for the first time at Niagara, on the 17th of September, 1792, and continued in session till the 15th of October. Eight bills were passed. The Ancient laws of Canada were abrogated without prejudice to existing rights, and it was provided, that in all future controversy with reference to property and civil rights, resort should be had to the laws of England as a rule for the decision of the same. Trial by jury was also established, and British rules of evidence were to be observed. The Criminal Law of England and the Habeas Corpus Act were already in force in both Upper and Lower Canada. The general effect of the Constitutional Act, was to make Upper Canada a British Province, with English laws, English institutions, and with all lands held on freehold tenure. Lower Canada, while receiving representative institutions, and the Criminal Law of England, remained, in other repects, a French Province.

The new constitution continued in operation for less than half a century. For a time it seemed to work well. Eventually, however, conflicts arose between the different branches of the Legislature, which kept the country in a state of continual agitation, and which led to the Rebellion of 1837-8, and the establishment in Canada of a new form

of government. The chief causes of dispute may be briefly outlined.

(1) The constitution and position of the Executive Council. In England, the Cabinet was chosen from the dominant party in the House of Commons, was directly responsible to the House of Commons, and as soon as its advice ceased to be in harmony with the views of the majority of that body, could be forced to resign. In Canada, the members of the Executive were chosen from the official classes,—usually from the members of the Legislative Council,—and the Assembly had no power of calling them to account for their deeds. Entrenched in their position behind the Legislative Council, which continually threw out the Assembly's bills, the Executive could afford to defy public opinion, and did. The representative government given by the Act of 1791, was but a name. The Executive represented the views and wishes of a small and exclusive class,—a class which looked with disfavour on the growing spirit of republicanism in Canada, and clung to the theory that Canada was to be ruled from London. Its government was the government of an oligarchy. In Upper Canada this oligarchy came to known as the "Family Compact," and the name gradually spread to the other Provinces. In Lower Canada this oligarchy was composed chiefly of the English speaking minority, and there the political quarrel was further aggravated by racial feelings. The demand went up for an Executive that should be more representative of the people, and should also be directly responsible to them for its acts. About 1828, the Home Government, acting on the recommendations of the Canada Committee, yielded the first point; and the Governors were instructed to choose their Executives from among the members of both Houses; but these instructions were usually carried out in such a way that the object of the reform was defeated. On the second point the Home Government showed more hesitation. They dreaded anything which might make the colonists too independent, or tend to weaken the authority

of the Crown; and while their intentions were good, they did not yet fully understand the situation in Canada. It was not until after they had received Lord Durham's Report, that they fully recognized the necessity of granting Responsible Government to Canada.

(2) The control of "the casual and territorial revenues," and of the supplies and the civil list, was a cause of constant trouble. It was in Lower Canada that the financial dispute was most aggravated. The Province had three sources of revenues,—(1) that derived from the tax imposed by the Crown on spirits and molasses under the Revenue Act of 1774 (14 Geo. III., 88); (2) that derived from the sale of lands, timber, mines, etc., called the "Casual and Territorial Revenue"; and (3) that derived from taxes imposed by the Assembly itself. The first two, constituting the Crown revenues, were under the control of the Governor and his Council, and it was from them that the expenses of the government of the Province was defrayed. About 1813, the royal revenues ceased to be sufficient to cover these expenses. On the other hand, the revenues voted by the Assembly were in excess of its appropriations for expenditure, and a surplus was created. This surplus was used by the Governor to meet the deficiency arising in the civil government, without authority from the Assembly. This continued until about 1817, and was the cause of considerable confusion and dissatisfaction. In that year Governor Sherbrooke brought the matter to the attention of Lord Bathurst. Bathurst recommended that for the future the Legislature be called upon to vote the sum required for annual expenditure. The Executive of that time was not responsible to the people, and did not possess the people's confidence. The Assembly saw the enormous power which the vote of supplies gave them. They refused to establish anything like a permanent civil list, but claimed the right of subjecting every item of expenditure to an annual vote, thus making every civil servant dependent on the personal feeling or caprice of the individual mem-

bers. The Legislative Council resented this claim. Time and again the supply bill was sent down to the Assembly, where it was discussed item by item, amended, and returned to the Legislative Council, only to be thrown out by that body. From 1833 to 1836 no supplies were voted, and matters came to such a pass that the transaction of business was impossible.

(3) The "Clergy Reserves" also formed a subject of dispute. The Act of 1791 authorized the setting apart of one-seventh of the Crown Lands for the support of the Protestant religion in Canada. In Lower Canada this was taken as an unjust discrimination against the Roman Catholic church; but the financial question overshadowed it. In Upper Canada the complaints raised were more serious, and the Reform party made this matter one of their principal grievances. Three objections were raised against the provision: 1. It was said that the grant was too large. 2. The Reserves did not lie in one block, but were made up of every seventh lot in the surveyed townships. These remained unimproved while the land about them was cleared, and thus prevented the formation of connected settlements. (3) The management of the lands was in the hands of the "Family Compact," who chose to interpret the words "Protestant clergy" as referring to the Church of England alone. The Presbyterians were able to make good their claim to share in the benefits of these grants, but other dissenting bodies were excluded, and much sectarian animosity was aroused. The dissatisfaction was still further increased when, in 1835, Sir John Colborne quietly formed fifty-seven rectories of the Church of England, and provided for their support from the Clergy Reserve.

(4) Disputes arose in a variety of other subjects. The Executive's administration of Crown Lands was attacked in Upper Canada. In both Provinces, the question of judicial independence was raised. In 1814, Chief Justice Sewell was impeached by the Assembly of Lower Canada, on a charge of having changed the rules of procedure in

his court without proper authority. Judge Monk, of Montreal, was also charged with official corruption. The Legislative Council refused to concur in these impeachments, and the Governor refused to suspend the Judges from office. The Assembly demanded that henceforth Judges should be excluded from holding seats in either House of Parliament. The difficulty arising out of the division, between Upper and Lower Canada, of the duties on goods imported by way of the St. Lawrence has already been referred to. It may be noted in this connection, that as early as 1822, a scheme was proposed for uniting the Canadas; but it provided for the use of no language but English in the parliamentary reports. The French protested and the plan was dropped.

The agitation was not confined to Upper and Lower Canada, but extended also to the Maritime Provinces. In the different provinces the struggle took different shapes. In all, the contestants were the same, and the great object to be attained was the same. On one side was ranged the Assembly, representing the people; on the other, stood the Legislative and Executive Councils, usually in alliance with the Governor. In all, the difficulty arose from the fact that they had the form of representative government without the reality; and the struggle was for the reality,—for what is known as Responsible Government. The real issue was clouded by other matters. Racial and religious feelings were aroused. When Lord Durham came, he found not only a "contest between a government and a people," but also "two nations warring in the bosom of a single state"; a struggle not of principles, but of races.

As a consequence of the continual agitation in the Canadas, the Imperial Government was again called upon to intervene. In 1828, a committee, known as "The Canada Committee," was appointed to examine into the points at issue. This committee recommended among other things,—(1) that the Executive and Legislative Councils be made more representative; (2) that the Crown duties

be placed under the control of the Assembly on condition that permanent provision should be made for the payment of Crown officials; (3) that the judges should give up their seats in the Legislative Council. To a certain extent the Colonial office sought to carry out these recommendations, but the Crown still refused to give up to the Assembly the control of the Casual and Territorial Revenues, and the dispute became hotter than ever. In 1834, the Assembly of Lower Canada formulated their grievances in what are known as "The Ninety-two Resolutions." Lord Gosford came out in 1835 as Governor-General, and as chairman of a commission of inquiry. One of the things demanded in the resolutions of 1834, was an elective Legislative Council. In 1837, Lord John Russell carried a measure in the House of Commons, in which this demand, as well as others, was positively refused. As the Assembly had for five years refused to vote supplies, Lord Russell's bill authorized the Governor-General to take £142,000 out of the Provincial Treasury and pay all arrears of the civil list. The result was rebellion. On the 10th of February, 1838, a bill was passed in England suspending the constitution of Lower Canada, and on the 29th of March, in the same year, Sir John Colborne appointed a special council to make temporary provision for the governent of the Province. In May, 1838, Lord Durham arrived as Governor-General and also as special comissioner, with power to settle disputes and for "the adjustment of certain important affairs, affecting the Provinces of Upper and Lower Canada." Lord Durham remained in Canada until the 3rd of November in the same year. On his return to England, he laid before Parliament an elaborate report dealing with the political difficulties of the Canadas, and recommending Imperial legislation to remedy the existing evils. He advocated,—(1) that the Canadas be reunited under one Legislature, and reconstructed as one province; (2) that the Executive be made responsible to the Assembly; (3) that the control of the Crown revenues be given over to the Assembly, on con-

dition of their voting an adequate civil list; (4) that the independence of the judges should be secured; and (5) that municipal institutions be established without further delay. In the union he hoped to find a cure for race jealousies, by causing parties in Canada to divide on new lines of local or sectional interest, rather than on those of race and language. In the second and third of the proposed changes, he hoped to find a cure for the constitutional evils of the country. On the 3rd of May, 1839, a royal message was laid before the Imperial Parliament recommending a union of the Canadas. In June, 1839, a bill to re-unite the two provinces was introduced, but was allowed to stand over, in order that the Canadas might be consulted and more information obtained. Mr. Poulett Thomson came out as Governor-General in November, 1839. He called together the special council which at once accepted the scheme of union. In December, he met the Legislature of Upper Canada, and both Houses passed addresses in favour of the proposed union. In the following year, Lord John Russell again brought forward his bill, which now passed both Houses, and was assented to on the 23rd of July, 1840.

*II. The Struggle for Responsible Government in the Maritime Provinces.*

In New Brunswick, the struggle between the Assembly and the Executive Council began almost immediately after the organization of the Province. The question at issue was that of the appropriation of the revenues. The Assembly demanded the right of raising and controlling the revenues. The Legislative Council resisted their claim. A dead-lock ensued, and for three years (1796-1799), no revenue or appropriation bills were passed. At length a compromise was reached, but the settlement was only temporary, and the quarrel soon broke out again. Under the leadership of Mr. Lemuel Allan Wilmot, the Reform Party began pressing its demands. Its first success was to have the Governor instructed to choose his Ex-

ecutive from the members of both Houses. The Governor made the concession vain by refusing to appoint any new members to his council. The Reformers next attacked the Crown Land Department, which was managed by a commissioner, and the revenues of which formed the Casual and Territorial Revenues, and were used to pay the expenses of the civil list. The Assembly asked for an account of the expenditure of this revenue and the request was refused. A delegation was sent to London to ask that the disputed revenues be placed under the control of the Assembly, but the mission failed. In 1836, the Assembly passed a resolution calling for a detailed statement of the sales of Government lands for the preceding year. The demand was again refused. Mr. Wilmot and Mr. Crane went to England with a new petition. As a result the Assembly was given full charge of the disputed revenues, and was required in return to make permanent provision for the salaries of governors and officials, and the appointment of members of the Assembly to seats on the Executive was recommended. Sir John Harvey was now made Governor of the Province, and under his government the strife between the two Houses was so far soothed, that a resolution favoring the adoption of Responsible Government was actually defeated in the Assembly. Sir John Harvey was succeeded by Sir William Colebrook, and the quarrel between the two parties was renewed over some appointments made by that autocratic Governor. The coming of Lord Elgin to Canada marked the final triumph of Responsible Government, in that Province. The desire for the same kind of constitution now began to make itself felt in New Brunswick. In 1848, a measure for Responsible Government was introduced in the Assembly and passed with an overwhelming majority.

In Nova Scotia the Family Compact was exceedingly strong. The Executive and Legislative Councils there formed but one body, which sat with closed doors, utterly regardless of public opinion or of the Assembly. In 1830,

a dispute arose over a tax which the Assembly had placed on brandy, and to which the Council refused to consent, considering the amount excessive. For a year no tax was collected. A general election came on. The new Assembly was even more unyielding than the old, and the Council was at last forced to give way. About 1835, Joseph Howe came forward as the champion of the popular cause. One of his first steps was to attack the Council for sitting with closed doors, and to bring about the passing of twelve resolutions, condemning both the constitution and procedure of that body. The resolutions were subsequently rescinded, but the gist of them was embodied in a petition to the Throne, praying for a redress of grievances. In 1837, the doors of the Council were opened to the public, the control of the revenues was handed over to the Assembly and the Executive was made to include members of both Houses. The Governor made these concessions in great part useless by appointing to the Executive only adherents of the compact. The Assembly, now controlling the revenues, refused to make permanent provision for the civil list, preferring to pass an appropriation bill each year.

The years 1837-40 witnessed the rebellion in Lower Canada, the report of Lord Durham, and also the publication of Lord Russell's despatch on the tenure of office. The Reformers in Nova Scotia maintained that the despatch applied to their Province as well as to Canada. Sir Colin Campbell, the Governor, refused to so interpret it, and continued his old Executive in office notwithstanding a vote of want of confidence passed in the Assembly. Campbell was recalled and Lord Falkland succeeded him. Falkland tried a policy of compromise. A coalition Government was formed, but the members could not agree. An open conflict took place on the subject of education. Falkland dissolved the House without consulting the Reform members of the Government. A vacancy occurring

on his Council, he appointed a new member on his own responsibility. The Reform members of the Government resigned. The battle once more began between Assembly and Governor. Falkland was replaced by Sir John Harvey. In 1847, an election took place. The House met in January, 1848, and showed a majority of Reformers. Johnstone, the Conservative leader, retired, and Howe, the leader of the Reformers, was called upon to form a Government. Responsible Government was now a fact in Nova Scotia.

In Prince Edward Island the political difficulty arose from the land monopoly, under which nearly all the lands in the Province had come into the hands of Englishmen, and which reduced the inhabitants of the island to tenants holding their farms of absentee proprietors. The land question was not settled until after Confederation. About 1848, the Province began to ask for Responsible Government. The colonial office could not well refuse what they had already granted to Nova Scotia and New Brunswick, and in 1851, the demand was granted.

In Newfoundland political life developed more slowly, than in any other of the Maritime Provinces. The merchants of St. John's, making great fortunes out of the fisheries, did all they could to keep the people in a state of dependence. It was not until 1832, that the island received anything like representative Government, in the form of a popular assembly. The strife between the Executive and the Assembly soon began. In 1842, the two Houses were united. The "Amalgamated Assembly," lasted till 1849, when the old order of things was restored. Newfoundland now began to feel that she too was entitled to the same privileges as had already been accorded to the other Provinces. At first the Colonial Office refused, but, in 1854, the refusal was withdrawn, and the Executive in Newfoundland was made responsible to the people.

## CHAPTER IV.

## CANADA UNDER THE UNION ACT, 1840-1867.

Lord Russell's bill provided for the union of Upper and Lower Canada, under the name of the Province of Canada, with a Legislature consisting of a Governor; an Upper House or a Legislative Council, of not less than twenty members, appointed by the Crown for life; and a Lower House, or Assembly, of eighty-four members, elected by the people, forty-two being sent from each of the united Provinces. The qualifications of the Legislative Councillors were practically the same as under the Constitutional Act, and their seats were rendered vacant by continuous absence for two successive sessions, without permission from the Governor. Ten members constituted a quorum. A majority of voices was to decide, and in case of a tie, the Speaker had a casting vote. The quorum of the Assembly was fixed at twenty, and the speaker, who was elected by the majority of the House, was given a casting vote. No one could be elected to the Assembly unless he possessed freehold lands, and tenements to the value of £500 sterling, over and above all charges and debts. The time and place of election were to be fixed by the Governor, who also, with a few exceptions, settled the limits of the constituencies returning representatives. The number of representatives allotted to each Province could not be changed except with the concurrence of two-thirds of the members of each House. The provisions for calling, proroguing, and dissolving the Legislature, remained the same as before, and each Assembly was to continue for four years unless sooner dissolved. The provisions of the Con-

stitutional Act, with reference to the granting or withholding of the royal assent, and to the disallowance of Her Majesty of bills assented to, were repeated and re-enacted.

A clause was inserted that the English language alone was to be used in legislative records. The section did not assume to forbid the use of the French language in debate, and as a matter of fact that language was used from the beginning. Indeed a proviso was appended to the section, to the effect that nothing in the Act should be construed to prevent translated copies of any documents being made. During the first session a series of rules were adopted, one of which provided that copies of the journals translated into the French language, should be laid on the tables daily for the use of the members; but the section prevented such translations from having the force of original records.

Arrangement was made for a permanent Civil List of £75,000 a year, and the control of all the revenues was granted to the Assembly. These revenues were to form a "Consolidated Revenue Fund," in which the order of charges was fixed as follows.—(1) expenses of collection and management of the fund; (2) the annual interest on the public debt of the Provinces; (3) payments to the clergy; (4) the Civil List. Once these payments were made, the Legislature could appropriate the remainder for the public service as it thought proper. But all bills or resolutions involving the expenditure of public money were to be first recommended by the Governor-General.

The Executive Council was to be composed of eight members, and was to be responsible to the Assembly. The bill became law on the 23rd of July, 1840. On the 5th of February, 1841, Lord Sydenham issued a proclamation that the union of the Provinces should take effect on the 10th of the same month. The first Parliament under the union met at Kingston, in June, 1841.

In his address the Governor-General declared himself bound by the principles of Responsible Government. In his instructions two important principles were recognized,—(1) that he should call to his Executive those persons who possessed the confidence of the inhabitants of the Province; and (2) that certain heads of departments should be called upon to retire from the public service as often as any sufficient motives of public policy might suggest the expediency of that measure.

During the session certain resolutions were introduced by Mr. Secretary Harrison, and passed unanimously. They asserted three principles,—(1) that the head of the Executive being, within the limits of his government, the representative of the Sovereign, is responsible to imperial authority alone; (2) that the chief advisors of the representative of the Sovereign ought to be men possessed of the confidence of the representatives of the people; (3) that the people of the Province had the right to respect that the imperial authority within its constitutional limits, should be exercised in the manner most consistent with their well understood wishes and interests. The principle of Responsible Government was beginning to be recognized and understood. During the succeeding six years some few misunderstandings arose,—especially during the administrations of Lord Metcalfe (1843-5), who made several official appointments without the advice of his Executive. In 1847, Lord Elgin came out as Governor-General. He received positive instructions "to act generally upon the advice of his Executive Council, and to receive as members of that body those persons who might be pointed out to him as entitled to do so by their possessing the confidence of the Assembly." The administration of Lord Elgin marks the final triumph of Responsible Government in the Province of Canada.

The Union Act remained in force for twenty-five years. During that time much important legislation was passed, the results of which may be briefly indicated.

(1) The independence of Parliament was secured, and judges and officials were prevented from sitting in either House.

(2) A system of municipal institutions was perfected in both Upper and Lower Canada. Lord Sydenham, in opening the Legislature of 1841, pointed out that it was "highly desirable that the principles of local self-government, which already prevailed to some extent in Upper Canada, should receive a more extended application, and that the people should exercise a greater control over their own local affairs." It had been proposed to make such a system a part of the Act of 1840; but the clauses dealing with the subject were struck out on the ground that such a purely local affair should be left to the Legislature of the Province. In 1841, Mr. Harrison, Provincial-Secretary of the Upper Province, introduced an Act providing that the inhabitants of each district should be a body corporate within certain prescribed limits, and providing also for the formation of municipal councils, with power to assess and collect from the inhabitants such moneys as might be necessary for purely local purposes, and generally to adopt such measures as might be required for the good government of their respective districts. During the suspension of the constitution of Lower Canada, an ordinance had been passed by the special council dividing the Province into some twenty-two districts, each with a warden appointed by the Governor-General, and a number of councillors elected by the people. In 1845, the ordinance of the special council was revoked by an Act which provided that every township or parish should constitute a municipal corporation, with a president, or mayor, and council, both elective. A number of Acts were passed during the years which followed, and before Confederation both Provinces were enjoying a system of municipal government resting on an essentially popular basis.

(3) The question of Clergy Reserves was finally dis-

posed of in 1854. The Act of 1791 required that all legislation respecting this matter should be laid before the Imperial Parliament, and receive its assent. In 1839, the Legislature of Upper Canada passed an Act to dispose of the question, but it failed to receive the approval of the imperial authorities. In 1853, an Act was passed (16 Vic. c. 21), which empowered the Canadian Legislature to deal with the question as it should see fit; provided only that the life interests of existing incumbents should be respected. In 1854, the Canadian Parliament passed an Act (18 Vic. c. 2), which, after making provision for the payment of existing claims, enacted that the balance of the Reserves should be divided among the several municipalities throughout the Province, according to population.

(4) In the same year, 1854, seigniorial tenure was abolished. Even under the French regime evils had shown themselves in the working of the system. High rents were enacted by the seigniors. Large reservations of timber, etc., were made by them in their sub-grants. The payment of mutation fines proved a hardship on the habitant. Under the French rule the intendant had always compelled the seignior to deal more or less justly with his vassal. With the removal of this check, the evils increased. As early as 1790 demands for the abolition of the system began to be heard. The question was not settled until more than half a century later, when, in 1854 (18 Vic. c. 3), the system was abolished.

(5) Before the granting of Responsible Government to Canada, the appointment of public officials was in the hand of the Home Government and the Governors. In these appointments Canadians, as a rule, were completely ignored. With the granting of Responsible Government a change was introduced. The British authorities declared that they had "no desire to make the Provinces the resource for patronage at home." They always sought to impress upon the Canadians the necessity of giving per-

manence and stability to the public service, and the inexpediency and impropriety of removing individuals from office from political motives, or for any cause other than incompetency or official misconduct. In 1857, a bill was introduced (20 Vic. c. 24), appointing permanent deputy-heads and grades in the different departments. This has been followed by subsequent legislation in the same direction.

(6) The Act of 1840, gave the Canadian Parliament control of the consolidated revenue fund, on condition of their granting a permanent Civil List; and the sums to be so paid were fixed by two schedules appended to the Act. In 1847, by the Imperial Act, 10 and 11 Vic. c. 71, the Imperial Government gave up every claim to dispose of Provincial moneys and the Canadian Legislature was given full power to grant a civil list, and to provide for the remuneration of judges, and other officers of the civil service, in the Provinces. At the same time, by 9 and 10 Vic. c. 94, the control of the post office was given up to the Legislature of Canada. In 1846, by the Act 9 and 10 Vic. c. 94, the British possessions in North America were freed from imperial interference in matters affecting trade and commerce, and the various colonial legislatures were empowered to adopt measures for the repeal of any imperial protective customs' duties, which had been previously imposed upon them. In 1849, by the Act 12 and 13 Vic. c. 29, the old navigation laws, by which nearly all the trade between the mother country and the colonies was limited to ships of British tonnage, were repealed, and the St. Lawrence was thrown open to the use of vessels of all nations.

(7) In 1848, by 11 and 12 Vic. c. 56, the provisions of the Union Act requiring the exclusive use of the English language in the legislature, was repealed. In 1854, 17 and 18 Vict. c. 118 was passed, empowering the Canadian Legislature to alter the constitution of the Legislative

Council. In 1856, the Canadian Legislature passed a bill providing for an elective Upper House of 48 members,—twenty-four to be elected from each of the old Provinces. The first election of councillors took place in 1856.

The constitution of 1840 remained in operation until 1867. Its main weakness lay in the fact that it compelled two Provinces, differing to so great an extent in their local interests and traditions, to interfere in each others' affairs. The political difficulty which led to the next great constitutional change arose out of the working of that part of the Union Act which gave each Province an equal number of representatives in the Legislature. In 1840, Lower Canada had the larger population. In about ten years these conditions were reversed. Upper Canada demanded increased representation in proportion to the larger population. The French regarded equality in representation as the safeguard of their speech and institutions, and resisted the demand. The principle of a "double majority" was one of the expedients by which it was hoped to arrange the conflict. It was asserted that no administration ought to continue in power unless it was supported by a majority from each section of the united Provinces. The principle was found to be unworkable, and was abandoned. Meanwhile the disparity in population continued to increase, and the cry from Upper Canada for "Representation by Population" became louder and louder. The parties were so evenly balanced that a single vote might decide the fate of an administration. From the 21st of May, 1862, to June, 1864, five different ministries were in power. During the session of 1864, a coalition government was formed on the basis of a federal union of all the British American Provinces, or, if that should fail, of the two Canadas. It happened that, at this time, Nova Scotia, New Brunswick, and Prince Edward Island were contemplating a "Maritime Union," and delegates from the three Provinces were to meet at Charlottetown to discuss the question. The

coalition Government of the two Canadas asked leave to be represented. The conference met on the 1st of September, 1864. The representatives from the Canadas laid before the convention their larger scheme. It was decided to hold another conference at Quebec to discuss the latter. The second conference met on October 10th, and resulted in the adoption of seventy-two resolutions, which form the basis of the British North America Act. In the session of 1865, the Legislature of Canada passed an address to Her Majesty, praying her to submit to the Imperial Parliament a measure "for the purpose of uniting the Provinces in accordance with the Quebec resolutions." After some hesitation, Nova Scotia and New Brunswick agreed to the union, but on condition that some changes in the terms should be made, which would be more favorable to the interests of the Maritime Provinces. Another conference was held at London in the fall of 1866, when a few changes in the financial terms of the contemplated union were made. On the 12th of February, 1867, a bill was introduced into the Imperial Parliament, providing for the union of Canada, Nova Scotia, and New Brunswick. The bill received the royal assent on the 29th March, and the new constitution came into force on the first of July, 1867.

By section 146 of the Act of 1867, provision was made for the admission of other colonies on addresses from the Parliament of Canada, and from the Legislatures of the respective Provinces. Rupert's Land and the North-West Territory might also be admitted on the address of the Canadian Parliament.

During the first session of the new Parliament an address was adopted asking for the union of Rupert's Land and the North-West Territory to the Dominion. In 1670, Charles II. had granted a charter to what was called the "Hudson's Bay Company," giving them full control of that country for two hundred years. In 1784, a rival company, known as the "North-West Company of Can-

ada," was formed; but in 1821 the two companies united. At the time of the passing of the address already referred to, this country was still in the hands of the Hudson's Bay Company. The address received a favorable response, and in July, 1868, an act was passed authorizing her Majesty to accept the transfer of the territory in question, and to admit the same into the Dominion of Canada. An agreement was finally reached between the Canadian delegates and the company, by which the latter surrendered its ancient proprietorship of the North-West Territories on the payment of £300,000 sterling, and the reservation to the company of certain lands and privileges. The agreement was confirmed by the Canadian Parliament in 1869. In the same year, an Act was passed providing for the appointment of a Lieutenant-Governor and Council to make provision for the government of the North-West Territories. In 1870, an Act was passed for the temporary government of Rupert's Land and the North-West Territories. In the session of 1870, the Canadian Parliament passed an Act to establish and provide for the government of Manitoba—a new Province formed out of the North-West Territory; and in 1871, the Legislature of Manitoba was elected, and provincial government regularly established. The Province was given representation in both Houses of Parliament. The members of the House of Commons took their seats in 1871; the senators in 1872. The two Acts admitting Rupert's Land and the North-West Territory and Manitoba into the Union were, because of doubts having been entertained respecting the power of the Dominion Parliament to enact them, confirmed by Imperial legislation.

British Columbia—which, since 1866, has included Vancouver's Island — became a part of the Dominion on the 20th of July, 1871. The terms of union included representation in both Houses, and the construction of a transcontinental railway. The members for the Province

took their seats in the Dominion Parliament during the session of 1872.

Prince Edward Island, though represented at the Quebec conference, refused to enter the union at that time. On the first of July, 1873, the Province was regularly admitted, and its members for the House of Commons and Senate took their seats for the first time in 1873.

In 1869, the House of Commons passed an address for the admission of Newfoundland, but the Province so far has refused to enter the union.

On July 31st, 1880, an Imperial Order-in-Council was passed, declaring that "from and after the first of September, 1880, all British territories and possessions in North America, not already included in the Dominion of Canada, and all islands adjacent thereto (with the exception of Newfoundland and its dependencies) should become part of the said Dominion of Canada."

The system of government introduced by the British North America Act succeeds in harmonizing the fundamental principles of the Constitutional Act of 1792 and the Act of Union of 1840. The Constitutional Act divided for all purposes Upper and Lower Canada into two separate Provinces, and placed each of them under an independent government. The Act of Union united for all purposes the two Provinces and gave to the two a single government. Under both of these systems the opportunity was afforded for perpetual racial conflicts between the two great races in Upper and Lower Canada. Under the Constitutional Act of 1792, both Provinces being separated, although local matters were properly left to the respective Provinces, matters of a national importance failed to secure the entire sympathy of both the French and English speaking races in the colony. Under the Act of Union of 1840, both Provinces being united, though unanimity

was observed respecting all matters of national concern, perpetual discord reigned between the contending races concerning local affairs in the two united Provinces. It was not until years had been employed in vainly attempting to successfully govern Upper and Lower Canada under constitutions which involved only the extremes, that statesmen commenced to realize that there lay a judicious system of government in that interval between the forms which had been tried. A mean reposed between the two extremes. There need not be an entire separation of the two Provinces and of the two races. Neither need there be an entire union. There might be separation for all purposes of a wholly local character; and union for all matters affecting interests that were federal and colonial. Upon these principles were prepared the Quebec Resolutions which subsequently became matured in the British North America Act of 1867, which provides Canada at the present time with its entire system of legislation. The constitutional history of Canada since confederation seems to have demonstrated that the combination of the fundamental principles found in the Constitutional Act of 1792 and in the Act of 1840, effected by the British North America Act of 1867, has supplied Canada as a Dominion and the Provinces as its individual units with the legislative requirements which are eminently fitted to the constitutional necessities of the country.

The constitutional history of Canada subsequent to Confederation assumes a new aspect. Prior to Confederation its development consisted principally in the alterations of its forms of government and the change from constitution to constitution. Since Confederation its development has been within rather than without the constitution; and the change has been not from one constitution to another, but from one interpretation to another of the constitution enacted in 1867. This development becomes one in which legal technicalities rather than the

benefit of the community appears as the prevailing feature. To understand that phase of Canadian Constitutional History it becomes necessary to consider in detail the British North America Act of 1867, and its various amendments. The second part of this work is devoted to that task.

# PART II.

# CANADIAN CONSTITUTIONAL LAW.

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## CANADIAN CONSTITUTIONAL LAW.

Constitutional Law is that department of jurisprudence which relates to the system of government of a country, and Canadian Constitutional Law is that particular division of Constitutional Law which relates to the system of government prevailing in the Dominion and the Provinces of Canada.

Constitutional Law is an important part of law in Canada, because it facilitates the inquiry into what Imperial laws are in force in Canada, and enables one to fix the definite limitations of the various authorities that have power to enact legislation operative in Canada.

There are three great authorities which have power to enact such legislation, and they are the following:—

1. The Imperial Parliament,
2. The Canadian Parliament, and
3. The Provincial Legislatures, including the law-enacting bodies of the Canadian Territories and the other organized parts of Canada.

The first of these authorities has unlimited powers;[1] while from it the others derive their entire jurisdiction. Within their limits these other authorities are supreme; and are also entirely independent of one another; and any one of them cannot, with certain exceptions (to be hereinafter specified—*e.g.*, Insolvency and Agriculture), infringe upon the jurisdiction of any other.

[1] Re Goodhue, 19 Gr. 366 at pp. 382 et seq. (1872).

The great function of Canadian Constitutional Law is twofold:—

First; to aid in the inquiry into what Imperial enactments are in force in Canada, and

Second; to aid in determining whether a statute passed by any legislative body in Canada is or is not within the power of that body to enact. Where a statute is within the legislative competence of the law-making body which enacts it, it is constitutional, or as is technically termed "intra vires"; and where it is not, then the statute is unconstitutional or "ultra vires." "Unconstitutional" when applied to Canadian[2] legislation is generally equivalent to "Not within the legislative competence of the enacting body." In Imperial legislation the word means "contrary to the custom of the centuries." But Canadian legislation has been held to be unconstitutional within the meaning given to the word when it is used in connection with legislation of the Imperial Parliament.[3]

In England an unconstitutional law is operative until it is repealed, until which time any act done pursuant to it is by it protected. In Canada an unconstitutional law is never operative and furnishes no protection for anything done under its provisions. The Parliament of Canada and the legislatures of the various Provinces and the North-West Territories have derived their jurisdiction at various times from different Imperial Statutes (referred to in the former part of this book), the latest of which in point of time is the British North America Act[4] and its amendments.[5]

[2] Likewise American.

[3] International Bridge Co. v. C. S. R. 28 Gr. 114 (1880). See this case referred to in note 7 to sub-section 11 of § 92 of the B. N. A. Act, 1867; post.

[4] 30-31 V. c. 3 (Imp.), 1867.

[5] 34-35 V. c. 28; 38-39 V. c. 38; 49-50 V. c. 35 (all Imp.).

The British North America Act does not expressly repeal the earlier statutes which from time to time conferred rights of a constitutional character upon parts of Canada, but all such enactments, as far as they affect those parts of Canada to which the British North America Act and its amendments extend, are merged in that statute.[6] And any constitutional institutions created in any part of Canada, to which the British North America Act and its amendments extend, under the authority of any of the prior constitutional enactments (*e.g.*, the legislatures of Nova Scotia, and New Brunswick,—see reference to such in § 88 of the B. N. A. Act), still exist in so far as they are continued by the B. N. A. Act, and do not conflict with its provisions. This concise statement of the law must be considered as the interpretation of the two chapters entitled "The Pre-Confederation Constitutions," and "What became of the Pre-Confederation Constitutions?" contained in pages 25 to 54 inclusive, of Mr. W. H. P. Clement's exposition of "The Law of the Canadian Constitution."

The British North America Act, 1867, has created authorities[7] which are empowered to enact laws; and these laws affect the inhabitants of Canada. But they affect the inhabitants of Canada only in so far as such laws are not repugnant to any Imperial legislation which has the force of law in Canada (*e.g.*, Act of the Imperial Parliament, or order, or regulation made under the authority of such Act).[8] Such laws however are not void because of repugnancy to "the law of England," unless repugnant to Act of the Imperial Parliament or order or regulation

[6] A. G. v. Mercer, 5 S. C. R. 538 at p. 675 (1881); City of Fredericton v. R., 3 S. C. R. 505 at p. 563 (1880); Church v. Blake, 1 Q. L. R. 177 at p. 181 (1876); Hodge v. R., 7 A. R. 246 at p. 252 (1881).

[7] The Parliament of Canada and the Provincial Legislatures.

[8] The Colonial Laws Validity Act, 28-9 V. c. 63 (Imp.), § 2 (1865).

made under the authority thereof,[9] nor are they void because of inconsistency with instructions given to the Colonial Governor by any instrument, except the letters patent or instrument authorizing him to concur in or pass laws for the peace, order, and good government of a colony, although such instructions may be referred to therein.[10]

Besides the British North America Act (1867), the following classes of English laws are also in force:—

1. In Canada;

(*a*) Such laws of the Imperial Parliament as have been re-enacted in Canada though subsequently repealed in England.

(*b*) The Common Law of England in so far as it is applicable to the circumstances of the country, and has not been superseded by positive legislation affecting Canada.

(*c*) Any law passed by the Imperial Parliament and extended to Canada by express words or necessary intendment.[1]

2. In the Provinces, and Territories.

*Ontario.*

(*a*) The Criminal Law of England as it was on September 17, 1792, except in so far as a change affecting Ontario has been made in same.[2]

(*b*) The English Law of property, civil rights, testimony and proof as it was on October 15, 1792, except in so far as a change affecting Ontario has been made in same.

[9] *Ibid.* § 3.

[10] *Ibid.* § 4.

[1] 28-29 V. c. 63, § 1 (Imp.), (1865).

[2] See post as to the Criminal Law in all the Provinces and Territories.

(*c*) The English Statutes of jeofails, of limitations, and for amendment of the law (omitting local statutes) enacted prior to January 17, 1822.[3]

(*d*) The English Thelluson Act.[4]

From these classes of laws, Blackstone excepts such English laws as were not applicable to the state and condition of the colony.

*Manitoba.*

The Civil and Criminal Laws of England as they were on July 15, 1870, in so far as they are applicable, and have not been changed by legislation affecting Manitoba.[5]

*British Columbia.*

The English Civil and Criminal Laws as existing on November 19, 1858, in so far as same are not from local circumstances inapplicable, and have not been changed.[6]

*The North-West Territories.*

The Civil and Criminal Laws of England as they were on July 15, 1870, in so far as they are applicable, and have not been changed by legislation affecting the North-West Territories.[7]

In Quebec, Nova Scotia, New Brunswick and Prince Edward Island there are no statutes such as there are in the remaining Provinces of Canada, determining specifically what Imperial enactments are in force in those older Provinces. And, in the absence of such statutes, it is submitted that the only Imperial laws having the force of law in those four Provinces are such laws as within the above enumeration have the force of law in the whole of Canada.

[3] R. S. O. (1897) c. 111, §§ 1 and 2.

[4] *Ibid*, § 3.

[5] 51 V. c. 33 (Dom.).

[6] Act No. 70 of 30 V. (B. C.), and R. S. C. (1886) c. 144, § 2.

[7] R. S. C. (1886), c. 50.

The Imperial Statutes and Orders in Council affecting Nova Scotia, New Brunswick and Prince Edward Island, and constituting the foundations of the early constitutions of these Provinces, are to be found in Appendix 2 to the third volume of Cartwright's Cases on the British North America Act (1887).

By the Criminal Code, 1892, § 5, it is provided that no one shall be proceeded against for any offence against any statute of England, Great Britain, or the United Kingdom, unless such statute is expressly extended to Canada. The English Criminal Law is now almost entirely superseded by the Criminal Code, and its amendments, as far as the provisions of the Code extend. The few cases it does not cover will probably be governed by the English laws as above.

The British North America Act, and its amendments, which provide Canada, the Provinces and those of the Territories which are self-governed, with their entire legislative jurisdiction, may be briefly outlined as follows:—

It divided the old Province of Canada (which was composed of the earlier Provinces of Upper and Lower Canada, and which had existed since 1840) into the two Provinces of Ontario and Quebec. These two Provinces, together with Nova Scotia and New Brunswick, it united into the Confederation of the Dominion of Canada. A central government was established with jurisdiction over all matters of federal concern, and in each Province a government was established with authority over all matters of local concern. These governments consist of, (a) in the Dominion, a Governor-General, who represents the Queen for federal purposes, and a Parliament consisting of a Senate of an unlimited number of life members, and a House of Commons of 213 elective members; and (b) in the Provinces:—a Lieutenant Governor who represents the Queen for Provincial purposes as fully as the Governor-General does for Dominion purposes, and a Parliament,

or Local Legislature, consisting of, in some Provinces, one elective body, and in others, one appointed and one elective body. The Cabinet system prevails in both federal and local governments. Provision is, by the Act made for the admission into the federal union of other parts of Canada. The Queen is at the head of the government, and responsible government almost entirely prevails. The Imperial Parliament has at all times, authority to interfere in Canadian affairs, but seldom does, and that body also retains sole power to legislate respecting Canada in matters which are of Imperial concern. The remainder of the Act consists of details. As many of its sections have been submitted to the Courts for judicial interpretation, and as many of the interpretations have been pronounced by the highest judicial authority, the cases upon this Act, it will therefore be seen, are of indispensable assistance in the exposition of the statute. It is consequently proposed to expound the text of the enactment with the aid of these judicial decisions.

So many readily accessible compilations contain reprints of the British North America Act 1867, that it has been deemed wise in this publication, which is intended principally for popular perusal, instead of reproducing the whole of the statute, to copy in the text only those sections of the Act on whose wording there has been expended judicial controversy, and to synopsize the remainder of the enactment. Those whom the monotonous and formal phraseology of the statute has hitherto repelled may perhaps be attracted by its substance. Moreover, some of the sections of the Act, among them sections 2,[8] 25, 42, 43, 81, 89, 127, 145, and parts of 4, 51, and 88 have recently (1893) been repealed,[9] since, having fulfilled their purpose, they are now obsolete, and are consequently no longer

[8] It is submitted that section 3 is here intended. See post, note to § 2.

[9] 56 V. c. 14 (Imp.), The Statute Law Revision Act (1893).

of any use to jurisprudence, though they may be of use to history.

The British North America Act, 1867, consists of a preamble, and eleven parts, comprising 147 sections and 5 schedules. Its title and sub-title are:—

"The B. N. A. Act, 1867 (30-1 V. c. 3). An Act for the Union of Canada, Nova Scotia and New Brunswick, and the government thereof, and for purposes connected therewith."

NOTE.—The B. N. A. Act, conferring legislative powers is not to be construed rigorously like a Penal Act, conferring judicial powers.[10]

In Attorney-General of Canada v. Attorney-General of Ontario (20 O. R. 222, at p. 254 [1890]), Boyd, C., employed the following words: "A liberal construction is to be given to this Act as a broad constitutional statute conferring and distributing high and large powers of government both as to Canada and the Provinces. This Act is to be read in the light of history, with a view to adjust its parts to the life and growth of free political communities."

The Preamble recites that the Provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Imperial Crown, with a constitution similar in principle to that of the United Kingdom; that such a union would advance Provincial and Imperial interests; and that such constitution should provide for legislative and executive authority, and with a provision for admitting other territory into the union.

The expression of desire above referred to was contained in the Quebec Conference Resolutions of 1864,[1] which formed the foundations of the B. N. A. Act.

Comparison has frequently been instituted between the Constitution of Canada and those of England and the United States of America. The results of such comparison may be stated briefly as follows:—

1. The Canadian Constitution, and also the Constitution of the United States of America resemble the English Constitution in the following particulars:—

[10] Paige v. Griffith, 18 L. C. J. 119, at p. 122 (1873).

[1] See Houston's Constitutional Documents.

(*a*) They each recognize the principle of government by the people.

(*b*) They each make a distinction between their legislatures and their executives, that is, between their law-making and their law-executing bodies.

2. The Canadian Constitution and also the Constitution of the United States of America differ from the English Constitution in the following particulars:—

(*a*) The Canadian and the American Constitutions are to be found in documents specifically intended to be constitutions, while that of England is to be found in customs, habits, conventions, judicial decisions, traditions, and institutions preserved and followed for centuries.

(*b*) In Canada and the United States the legislature and the executive are creatures of law; in England they are the growth of the ages.

(*c*) In Canada and the United States the legislature is subordinate to the judiciary, and all the legislation of all the legislative bodies in both countries is subject to examination by the Courts, but in England the Courts have no control over Parliament whatever.

(*d*) In Canada and the United States the legislature and the courts are each supreme within their respective defined jurisdictions, but in England the legislature is supreme, and has absolute control over the Courts.

(*e*) In Canada and the United States, the legislatures can validly legislate only within the spheres their constitutions have allotted to them, but in England the legislature can validly legislate concerning everything.

(*f*) In Canada and the United States the constitutions cannot be changed by the legislature, except in certain particulars and under certain circumstances. In England the constitution may be changed by the legislature in any part and under all circumstances.

3. The Constitution of Canada resembles that of the United States in the following particulars:

(*a*) In each of Canada and the United States there is one central legislature with a jurisdiction extending over the whole country, and a number of subordinate local legislatures with jurisdictions territorially as well as otherwise limited.

(*b*) In both Canada and the United States all the local legislatures are entirely independent of one another.

(*c*) In both of these countries the central and the local legislatures are each supreme within the spheres of their respective jurisdictions.

(*d*) In both countries the powers of all the legislative bodies are legally limited by the authorities constituting them. (The B. N. A. Act in Canada, and the American Constitution in the United States.)

(*e*) In both countries the legislature and the Courts are independent of one another, and are supreme within the spheres of their respective jurisdictions.

(*f*) In both countries the legislatures are creatures of the authorities constituting them, and have no powers except those which such authorities have given them.

(*g*) In Canada and the United States an unconstitutional proceeding of the legislature is corrected by the Courts, which are the creatures of the laws that the people have enacted; in England an unconstitutional proceeding of the legislature is corrected (if at all) by the electorate alone. The results, conservative constitutional historians contend are not sufficiently dissimilar to justify a closer harmonizing of the systems.

4. The Constitution of Canada differs from that of the United States in the following particulars:—

(*a*) In the United States control over a specified number of subjects is vested in the central government (the American Congress), while control over all other subjects is vested in the various local (State) legislatures. In Canada, control over a specified number of subjects is vested in the local (Provincial and Territorial) legislatures, while control over all other subjects is vested in the central government (the Dominion Parliament); or in other words in the United States the residuum of power is in the State (or local) legislatures, while in Canada it is vested in the Dominion Parliament (the central government).[2]

(*b*) In Canada and also in England the Cabinet or Ministry is chosen from among the members of the predominant party in the representative body; and the majority or more important officers[3] of this Cabinet are themselves representatives of sections of the electorate. As such predominant party is the choice of the electorate, its representatives in the Cabinet are directly responsible to the people. A government carried on in this way is called responsible government. In the United States the Cabinet is composed of men who are not chosen from, and do not occupy seats in any representative body, who frequently are of a contrary political persuasion from that of the majority in

[2] Valin v. Langlois, 5 A. C. 115. See judgment of Ritchie C.J., in Supreme Court of Canada, 3 S. C. R. 1 (1879).

[3] E.g. the Ministers who control the principal money expending departments.

the representative body, who are nominees of the President, and who are consequently not responsible for their official acts to the people.

(*c*) In Canada and also in England the legislatures have power to interfere with the contracts of anyone. In the United States the legislatures cannot interfere with contractual relationships.[4]

(*d*) In Canada a tax bill before being introduced into Parliament must be recommended by the Governor-General; and such bill must originate in the representative house. In the United States such a measure may be introduced without recommendation, by anyone, and in any house.[5] In Canada, it is usually introduced by a Minister of the Crown.

(*e*) In Canada, the federal power can veto Provincial legislation, but in the United States there is no veto power in the Congress.

One other point may be of interest. Time does not run in Canada against *ultra vires* legislation.

The first part of the Act is entitled "Preliminary," and consists of sections 1 and 2.

SECTION 1. Gives the Confederation Act the title of the British North America Act, 1867.

This Act has also been called The Federation Act.[6]

There are two other Acts entitled the same as this one; they are the B. N. A. Acts of 1871,[7] and of 1886,[8] respectively. By section 3 of the latter of these the three Acts are to be construed together and are to be called The British North America Acts, 1867 to 1886. The Parliament of Canada Act (1875)[9] amends section 18 of this statute.

SECTION 2. Extends all references to Her Majesty in the Act to her heirs and successors

[4] See note 2 to § 41, post; 4 Wheat, 518 (1819).

[5] See § 54, post.

[6] Bank of Toronto v. Lambe, 12 A. C. 575 at pp. 583, 586, 587 (1887).

[7] 34-35 V. c. 28 (Imp.).

[8] 49-56 V. c. 35 (Imp.).

[9] 38-39 V. c. 38 (Imp.). See notes to section 18.

This section appears to have been repealed,[10] as spent; but it is submitted that a clerical error exists in at least the printed copies of the repealing enactment, and that what the legislature contemplated repealing was not this section, but the section immediately succeeding. Section 3, or at least part of it is spent; the day has long been named and the proclamation has long been published, and is now a part of history. What has been done cannot be undone, and the existence, or the non-existence of that section, can have no further influence on Canada. But with section 2 repealed, a great many of the continuing sections of the statute are materially affected; and among others, sections 9, 10, 14, 26, 27, 55, 56 and 57, shall cease to be operative on the demise of the Queen. In a sentence Imperial Sovereignty is to remain in Canada only during the present monarch's life. That so great a revolution could have been intended to occur so tranquilly in Canada when one of much lesser dimensions was averted, although it was induced by many years of unrest, in another portion of the Empire, is scarcely probable. And that a useful and indispensable section of a statute, should have been repealed, while one that is useless as well as spent should be continued, is an uncommon experience in Imperial legislation.

The second part of the Act is entitled "Union," and consists of sections 3 to 8 inclusive.

SECTION 3.[1] Provided that Upper and Lower Canada, Nova Scotia and New Brunswick should, on a day, within six months after the passage of the B. N. A. Act, which day was to be named in a Royal Proclamation, become the Dominion of Canada.

1. The proclamation bore date May, 22, 1867, and the day named was July 1st, of that year.

2. The object of the Act was to create a federal government in which all should be represented, intrusted with the exclusive administration of affairs in which they had a common interest, each Province retaining its independence and autonomy.[2]

SECTION 4. Provided that the subsequent provisions of the Act should operate from and after the Union,

[10] See 56 V. c. 14 (1893), (Imp.).

[1] See notes to § 2.

[2] Maritime Bank v. Receiver-General of N. B. (1892) A. C. 437, judgment of Lord Watson.

unless the contrary appeared. And the name Canada shall mean Canada as constituted under the B. N. A. Act.

The portion of this sub-section synopsized in the first of the two immediately preceding sentences has been repealed, by the Imperial Statute Law Revision Act, 1893 (56 V. c. 14).

SECTION 5. Divides Canada into four Provinces: Ontario, Quebec, Nova Scotia and New Brunswick.

There were at the time of Confederation three other provinces in Canada — Newfoundland, Prince Edward Island and British Columbia. Pursuant to the authority given in section 146,[3] of the B. N. A. Act, two of these, Prince Edward Island and British Columbia, have since 1867 been admitted into the Union; and pursuant to the authority given by the B. N. A. Act of 1871,[4] a new Province, Manitoba, was constituted and admitted into the Union.

SECTION 6. Separates the Province of Canada as it existed at the Union into two parts, and constituted that part of it which, prior to 1840, was Upper Canada into the Province of Ontario, and that part of it which, prior to that date, was Lower Canada into the Province of Quebec.

SECTION 7. Gives Nova Scotia and New Brunswick their present boundaries.

SECTION 8. Provides for a decennial census—the first part to be in 1871,—the same to distinguish the populations of each of the four Provinces.

The Third Part of the Act is entitled "Executive Power," and consists of sections 9 to 16 inclusive.

SECTION 9. Continues the executive power of Canada in the Queen.[5]

The Queen having surrendered to Canada the right of self-government retains some rights and prerogatives still in connection with Colonial affairs. They are as follows:—

1. The appointment of the Governor-General.

[3] See notes to § 146.
[4] 34-35 V. c. 25 (1871), (Imp.).
[5] See notes to section 2 ante.

2. The appointment of a Canadian Military and Naval Commander.

3. The arrangement of international affairs in which Canada is interested.

4. The disallowance of Colonial Legislation.

5. The hearing of appeals from Canadian Courts in the Privy Council.

6. The changing of the seat of government of Canada.[6]

7. The increasing of the membership of the Senate in special cases.[7]

"The Queen is the head of the Constitutional Government of Canada, and in matters affecting the Dominion at large her prerogatives are exercised by the Dominion Government."[8]

(The word "Prerogatives" in this judgment does not operate to grant any of the above to the Dominion Government.)

The Queen in Dominion affairs is represented by the Governor-General, and in Provincial affairs by the Lieut.-Governors.[9]

SECTION 10. Applies the provisions of the Act referring to the Governor-General to whomsoever may for the time being be administering the government.

1. The Governor-General is a corporation sole.[10]

2. Within the compass of his power no civil liability attaches to the Governor-General.[1]

3. For all other acts he is civilly liable, and Colonial Courts have jurisdiction to entertain actions arising from such acts.[2]

[6] B. N. A. Act (1867), § 16.

[7] B. N. A. Act (1867), § 26-7.

[8] Queen v. Bank of Nova Scotia, 11 S. C. R. 1 (1885); Liquidators of the Maritime Bank v. The Queen, 17 S. C. R. 657 (1888).

[9] Queen v. Bank of Nova Scotia, 11 S. C. R. 1, at p. 24 (1885); Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick (1892), A. C. 437 at 443; Attorney-General of Canada v. Attorney-General of Ontario, 23 S. C. R. 458 (1894); section 58 of B. N. A. Act, 1867.

[10] R. S. C. (1886), c. 3.

[1] Hill v. Bigge, 3 Moo. P. C. 465; Macbeath v. Haldimand, 1 T. R. 172; R. v. Eyre, L. R. 3 Q. B. 487; Farbrigas v. Mostyn, Cowp. 161.

[2] Musgrave v. Pulido, L. R. 5 A. C. 102.

4. He is criminally liable for all offences of a criminal nature committed by him.[3]

5. The following are the sources from which the Governor-General derives his powers:—

(*a*) The B. N. A. Acts.

(*b*) The Letters Patent.

(*c*) His Commission.

(*d*) Instructions.

(1) Under the Royal Sign Manual and Signet.

(2) By order of the Imperial Privy Council.

(3) Through an Imperial Secretary of State.

(*e*) All laws giving him any powers, and which are in force in Canada.

6. The following are the Governor-General's prerogatives:—

(*a*) To appoint to office Privy Councillors,[4] Senators,[5] Speaker of the Senate,[6] certain Judges,[7] Deputy-Governor,[8] certain officers,[9] and Commissioners.[10]

(*b*) To summon and prorogue Parliament.[1]

(*c*) The exercise of the prerogative rights of the Crown as part of the Parliament of Canada.

(*d*) The disallowance of Provincial Acts.

(*e*) The exercise of the prerogative of honour and mercy as far as not to invade the similar right of the Lieutenant-Governors.[2]

SECTION 11. Provides for the constitution of a Canadian Privy Council, whose members shall be nominated by the Governor-General, he being also empowered to remove same.

[3] Hill v. Bigge, 3 Moo. P. C. 465.

[4] B. N. A. Act (1867), § 11.

[5] B. N. A. Act (1867), § 24.

[6] B. N. A. Act (1867), § 34.

[7] B. N. A. Act (1867), § 96.

[8] B. N. A. Act (1867), § 14.

[9] B. N. A. Act, 1867, § 131.

[10] The Letters Patent.

[1] B. N. A. Act, § 38.

[2] A.-G. for Canada v. A.-G. of Ontario, 19 A. R 31 at p. 38 (1892); R. v. Bank of Nova Scotia, 11 S. C. R. 1, at p. 24 (1885).

SECTION 12. Enacts that all powers which, at Confederation, any competent authority reposed in a Governor or Lieutenant-Governor; or Governor or Lieutenant-Governor in Council, shall, as far as the same continue after the Union, repose in the Governor-General or Governor-General in Council.

1. The Crown still retains the prerogative right of issuing a commission to the Judge of a Provisional Judicial District (e.g. Algoma), to hold a Court of Oyer and Terminer and General Gaol Delivery for the trial of felonies.[3]

2. Such a commission by the Deputy of the Governor-General is valid by § 65 and § 96.[4]

3. The competent authorities referred to in this section are the following:—

(*a*) Acts of the Parliament of Great Britain.

(*b*) Acts of the Parliament of the United Kingdom of Great Britain and Ireland.

(*c*) Acts of the Legislatures of Upper Canada, Lower Canada, Nova Scotia, New Brunswick.

4. And by this section the Dominion Parliament is given power to abolish or alter any of these powers except those created by Act of Parliament of Great Britain or of the United Kingdom of Great Britain and Ireland.

5. This section does not interfere with any of the common law prerogatives of the Crown.

6. See also notes to section 65.

SECTION 13. Declares that the provisions of the B. N. A. Act referring to the Governor-General in Council, shall be construed as referring to the Governor-General acting with the advice of the Canadian Privy Council.

SECTION 14. Gives the Governor-General power to appoint a deputy or deputies, such appointment, however, not affecting the Governor-General's own power.

SECTION 15. Vests the command of all the Canadian forces in the Queen.

[3] R. v. Amer, 42 U. C. Q. B. 391 (1878).

[4] *Ibid.*

SECTION. 16. Fixes the seat of government in Ottawa, subject to a change by the Queen.

The Fourth Part of the Act is entitled "Legislative Power," and consists of sections 17 to 57 inclusive.

SECTION 17. Gives one Parliament to Canada, the same to consist of the Queen, the Senate,[5] and the House of Commons.[6]

Note.—The Queen is at the head of the Constitutional Government of Canada.[7]

SECTION 18. Gives the Senate and the House of Commons, including the members thereof, power to enjoy such privileges as may from time to time be defined by Act of the Canadian Parliament, but such powers shall never exceed those enjoyed by the Imperial Commons at the passing of this Act.

A question arose whether "this Act" meant the Act of the Canadian Parliament, or the British North America Act. The Parliament of Canada Act, 1875,[8] amended the section so as to give it the former construction.

The privileges referred to in this section are regulated by R. S. C. (1886), c. 11, §§ 3-8 and 20-23 inclusive.

SECTION 19. Provided that the first session of the Canadian Parliament should be called together not later than six months after the Union.

It was called together on the 6th of November, 1867, and was prorogued on the 22nd of May, 1868.

SECTION 20. Provides for an annual session of the Canadian Parliament, and also provides that one year is not to intervene between the last sitting of one session and the first sitting of the session succeeding.

§§ 21-36 affect the Senate.

[5] See B. N. A. Act, § 21 *et seq.*

[6] See B. N. A. Act, § 37 *et seq.*

[7] R. v. The Bank of Nova Scotia, 11 S. C. R. 1 (1885); Liquidators of the Maritime Bank v. R., 17 S. C. R. 657 (1889).

[8] 38-39 V. c. 38 (Imp.).

SECTION 21. Limits the number of Senators to 72.

**There is now no limit to the number of Senators,[9] but this section has never been repealed.**

SECTION 22. Distributes this number as follows:—

1. To Ontario—24.
2. To Quebec—24.
3. To the Maritime Provinces—24; of these Nova Scotia and New Brunswick are each represented by 12.

**The Quebec Senators are each to represent one of the Lower Canada Electoral Divisions as defined by Schedule A. to chapter 1 of the Consolidated Statutes of Canada.**

SECTION 23. Enumerates the qualifications of a Senator. They are as follows:—

He shall—

(1) Be Thirty years of age.

(2) Be a natural born or naturalized subject of the Queen.

(3) Be the owner of $4,000 equity in realty.

(4) Be the owner of $4,000 above all liabilities.

(5) Be a resident of the Province he represents.

(6) In the case of a Quebec Senator, have his realty qualification in the electoral district he represents.

SECTION 24. Provides for the summoning of the Senators by the Governor-General in the Queen's name and by Patent under the Great Seal of Canada.

SECTION 25. Provides for the summons by warrant of the Queen of the first body of Senators (their names to appear in the Proclamation of Union).

**This section has been repealed as spent by the Statute Law Revision Act of 1893.[10]**

[9] 34-35 V. c. 28 (Imp.), (1871).

[10] 56 V. c. 14 (Imp.).

SECTION 26. Allows the Queen on the recommendation of the Governor-General to add three or six members to the Senate; such addition to be equally representative of the three divisions of Canada mentioned in § 22 of the B. N. A. Act.

**These divisions are**

1. **Ontario,**
2. **Quebec, and**
3. **The Maritime Provinces.**

**This provision was inserted for the purpose of avoiding political deadlocks.**

SECTION 27. Provides that on compliance with section 26, no other Senator shall be summoned except on a similar recommendation, until each of the three divisions of Canada has only 24 representatives.

SECTION 28. Fixed the maximum number of Senators at 78.

**There is now no maximum number of Senators.[1] This section, however, has not been expressly repealed.**

SECTION 29. Gives a Senator a life tenure of place in the Senate, subject to the provisions of the B. N. A. Act.

**These provisions are found in §§ 30 and 31.**

SECTION 30. Allows a Senator to resign his place by notice in his own hand to the Governor-General.

SECTION 31. Enacts that a Senator's place shall become vacant in any of the following cases:—

1. If for two consecutive sessions of Parliament he makes default in attendance in the Senate.
2. If he becomes a subject of a foreign power.
3. If he becomes bankrupt.
4. If he is attainted of treason or is convicted of felony or any infamous crime.

[1] 49-50 V. c. 35, § 2 (Imp.), 1886.

5. If he loses his property or residence qualification. These, however, are not lost by his residence at Ottawa while holding a government office requiring him to be there.

SECTION 32. Provides that when a vacancy occurs in the Senate the Governor-General shall fill it.

**This is a directory and not a mandatory section.**

SECTION 33. Empowers the Senate to adjudge upon the questions of the qualification of a Senator or of a vacancy in the Senate.[2]

SECTION 34. Empowers the Governor-General to appoint under the Great Seal of Canada the Speaker of the Senate, and also to remove him.

**As to Deputy-Speaker, see § 47.**

**By R. S. C. (1886), c. 11, § 24 (*a*), the salary of the Speaker of the Senate is fixed at $4,000 a year.**

SECTION 35. Provides that until the Canadian Parliament makes a change, the quorum of the Senate shall consist of 15 Senators, including the Speaker.

**The Canadian Parliament has not made any change respecting this provision.**

SECTION 36. Declares that voting in the Senate shall be decided by majority vote—the Speaker always voting—and in case of an equality in the votes, the question is to be deemed negatived.

**See § 49 as to the Commons.**

Sections 37-52, inclusive, affect the House of Commons.

SECTION 37. Constitutes the House of Commons with (subject to the provisions of the B. N. A. Act) 181 members,—82 for Ontario, 65 for Quebec, 19 for Nova Scotia, and 15 for New Brunswick.

[2] **See notes to § 41.**

Under the authority of §§ 51-52 of the B. N. A. Act, R. S. C. (1886), c. 6 and 7; 55-56 V. c. 11; 56 V. c. 9; and 58-59 V. c. 10, have fixed the Dominion representation as follows.—

| | | |
|---|---|---|
| Ontario | 92 | members. |
| Quebec | 65 | |
| New Brunswick | 14 | |
| Nova Scotia | 20 | |
| Prince Edward Island | 5 | |
| Manitoba | 7 | |
| British Columbia | 6 | |
| North-West Territories | 4 | |
| Total | 213 | |

SECTION 38. Empowers the Governor-General in the Queen's name to call together, by Instrument under the Great Seal of Canada, the House of Commons.

SECTION 39. Disqualifies Senators from sitting or voting in the House of Commons.

SECTION 40. Enacts that until the Canadian Parliament otherwise provides,[3] Ontario shall be divided into the electoral districts set out in Schedule I. to the B. N. A. Act, and Quebec, Nova Scotia, and New Brunswick shall be divided into 65, 18, and 14 electoral districts respectively as they were at the Union.

Schedule I. having long since been superseded, it is not now reprinted. See note 1 to § 41.

SECTION 41. Continues until the Canadian Parliament otherwise provides, the Election Laws of the several Provinces as they were at the time of the Union, and also specially provides for a manhood franchise in the District of Algoma.

1. R. S. C. 1886, c. 5, 8, 9, 10, 11, and amending Acts, have otherwise provided respecting the matters referred to in this § and § 40.

2. An Act of Canada passed prior to 1867 voided any contract referring to or arising from a parliamentary election, even for payment of lawful expenses; after Confederation the Dominion

[3] See notes to § 41.

Parliament passed a somewhat similar statute omitting this or a similar provision. Held, this section and § 129 continued such law, and the early Act was still in force, and a promissory note given to cover expenses of a subsequent Dominion election was void.[4]

SECTIONS 42 and 43. Referred to the writs for the first elections, and vacancies in the House of Commons prior to the Parliament's making provision respecting same.

These sections have been repealed by the Statute Law Revision Act of 1893.[5]

SECTION 43—see § 42.

SECTION 44 Provides that the House of Commons shall after each general election elect one of its members as Speaker, who, by § 46, shall preside at all meetings of the House of Commons.

See §§ 45 and 47.

The salary of the Speaker is $4,000 a year.[6] In Canada all Speakers are supposed to be non-partisan; in the United States they are supposed to be eminently partisan.

SECTION 45 Empowers the House of Commons in case of a vacancy in the office of Speaker, to elect another Speaker from among its members.

SECTION 46—see § 44.

SECTION 47 Provides that on the absence of the Speaker from the chair of the House of Commons for forty-eight consecutive hours, the House may elect an acting Speaker whose authority during the absence of the Speaker shall be that of the Speaker.

48-49 V. c. 1 (Dom.), creates the office of Deputy-Speaker.

SECTION 48 Provides that the quorum of the House of Commons shall be 20 members, the Speaker being counted a member.

[4] Willett v. De Grosbois, 17 L. C. J. 293 (1873).

[5] 56 V. c. 14 (Imp.).

[6] R. S. C. (1886), c. 11, § 24.

SECTION 49 Declares that the voting in the House of Commons shall be decided by majorities, the Speaker having a vote only when the voices are equal.

See § 36 as to the Senate.

SECTION 50 Limits the duration of the House of Commons to five years from the day of the return of the writs for choosing the Commons with power to the Governor-General to sooner dissolve it.

SECTION 51 Provides for a decennial readjustment of representation, to take place after each decennial census taking,[7] at times to be provided for by the Canadian Parliament, but according to the following plan:—

(*a*) Quebec is to have 65 members always.

(*b*) The other Provinces are to have a proportionate number of representatives.

(*c*) Less than half the number of inhabitants required to entitle a Province to a representative, above those already represented or about so to be, is to be disregarded, but more than half such number is to be counted as equivalent to the whole number required to give a representative.

(*d*) But a Province's representation is not to be reduced unless the proportion which its population bore to that of Canada at the last preceding readjustment has been decreased by at least one-twentieth.

(*e*) Such readjustment is not to take effect until the end of the current Parliament.

55-56 V. c. 11, 56 V. c. 9, and 58-59 V. c. 10.

SECTION 52 Provides that the Canadian Parliament may increase the number of members of the House of Commons as long as the proportion prescribed by the B. N. A. Act[8] is maintained.

[7] See B. N. A. Act, 1867, § 8.
[8] § 51.

Sections 53-6 affect Money Votes and Royal Assent.

SECTION 53 Enacts that appropriation and tax bills shall originate in the House of Commons.

SECTION 54 Provides that appropriation and tax bills must first be recommended to the House of Commons by the Governor-General.

**In the United States legislatures, any member, on his own responsibility, may introduce a tax bill.**

SECTION 55 Empowers the Governor-General to assent to, or to refuse to assent to, or to reserve for the Royal Pleasure, any bill passed by Parliament.

SECTION 56 Provides that each bill assented to shall be sent to one of the Queen's Secretaries of State, and the Queen within two years from the receipt thereof may disallow the same; and such disallowance is to operate from and after the day it is communicated to Parliament by the Governor-General.

SECTION 57 Provides that where a bill is reserved[9] for the Royal Pleasure it shall have no operation unless and until within two years from the day of its presentation to the Governor-General, this officer notifies Parliament that it has been assented to by the Queen in Council. Such notification is to be recorded in the journals of Parliament.

**In case there is no notification within two years as provided in this section, the bill becomes a lost measure.**

The Fifth Part of the Act is entitled "Provincial Constitutions," and consists of sections 58-90, inclusive.

Sections 58-68, inclusive, refer to Executive Powers.

SECTION 58 Gives each Province a Lieutenant-Governor, appointed by the Governor-General in Council, by Patent under the Great Seal.

[9] See § 55.

1. The Lieutenant-Governors in the Provinces represent the Queen.[10]

2. The Lieutenant-Governors act alone, or with the advice of their Councils.[1] They act alone under sections 63, 72, 82, 85 and 90 of the B. N. A. Act.

SECTION 59 Allows a Lieutenant-Governor to hold office during the Governor-General's pleasure, but provides that any Lieutenant-Governor appointed after the Canadian Parliament first meets, shall not be removable within five years from his appointment, except for cause shown to him in writing within one month after the order for his removal is made, and the same shall be communicated to Parliament within one week thereafter, if Parliament be then sitting, or if it be not, then within one week after the following session opens.

The only case where a Lieutenant-Governor has been removed is that of Hon. L. Letellier, Lieutenant-Governor of Quebec, whose removal occurred in 1878.

SECTION 60 Empowers the Dominion Parliament to fix the salaries of the Lieutenant-Governors.

They are as follows:—

| | | | |
|---|---|---|---|
| Salary of the Lieut.-Gov. of | Ontario | $10,000 | a year. |
| " " " | Quebec | 10,000 | " |
| " " " | New Brunswick | 9,000 | " |
| " " " | Nova Scotia | 9,000 | " |
| " " " | Prince Edward Island | 7,000 | " |
| " " " | Manitoba | 10,000 | " |
| " " " | British Columbia | 9,000 | " |
| " " " | North-West Territories | 7,000 | " |
| " the Administrator of | the Yukon | 6,000 | " |

SECTION 61 Provides that every Lieutenant-Governor shall take the oaths of allegiance and of office.

[10] See B. N. A. Act, § 66.

[1] Queen v. Bank of Nova Scotia, 11 S. C. R. 1, at p. 24; Liq. of Mar. Bank v. Recr.-Gen. (1892), A. C. 437 at p. 443 (reversing in effect the dictum to the contrary in Gibson v. McDonald, 7 O. R. 401 (1885); A.-G. of Can. v. A.-G. of Ontario, 23 S. C. R. 458 (1894). See § 9 ante.

SECTION 62 Extends the provisions referring to the Lieutenant-Governor to future Lieutenant-Governors the Administrators.

SECTION 63 Provides for the appointment of Executive Councils in Ontario and Quebec.

1. Since 1867 the members of these Councils have been changed and are now (1899) as follows:—

In Ontario,
Attorney-General,
Commissioner of Crown Lands,
Commissioner of Public Works,
Provincial Secretary,
Provincial Treasurer,
Minister of Education,
Minister of Agriculture and Registrar,
And two Ministers without Port folio.

In Quebec:—
Speaker,
Commissioner of Crown Lands,
Commissioner of Agriculture,
Attorney-General,
Commissioner of Public Works.
Provincial Secretary and Registrar,
Provincial Treasurer,
And two Ministers without Portfolio.

2. Members of a Provincial Executive Council represent the Sovereign and cannot be sued for official acts.[2]

SECTION 64. Continues the former Executive Constitutions of Nova Scotia and New Brunswick.

In Nova Scotia the executive authority consists of an Executive Council comprising the following officers:—
Attorney-General,
Provincial Secretary,
Surveyor-General,
Chief Commissioner of Public Works,
Solicitor-General,
And two members without office,
And a House of Assembly of forty-six members.

[2] Molson v. Chapleau, 6 Q. L. N. 222 (1883).

In New Brunswick the executive authority consists of an Executive Council comprising the following officers:—

Attorney-General,
Provincial Secretary,
Commissioner of Works and Mines,
And three members without office,
And a House of Assembly of thirty-eight members.

SECTION 65 Vests the executive powers exercisable under the prior constitutions by the Governors, (whether alone or in council). of the old Provinces of Upper and Lower Canada, in the Lieutenant-Governors of Ontario and Quebec, (alone or in council, respectively), subject to abolition or alteration by the Ontario or Quebec legislatures respectively, in so far as they have power.

1. See note to § 137.

2. The powers referred to in this section are statutory powers.

3. The Lieut.-Governor of a Province (Ontario), as well as the Governor-General has power under this section to issue commissions to hold Courts of Assize. Such power was vested in the Lieut.-Governor of Upper Canada up to 1841, and in the Governor-General from 1841 to Confederation, and after the taking effect of the B. N. A. Act they vested as far as the administration of Justice in Ontario is concerned, in the Lieut.-Governor of Ontario.[3]

4. This section preserves only as much of the organization of the executive authority as is required for carrying on the affairs of the country.[4]

5. Prior to Confederation the Governor in Council could, under § 32 of Con. St. of L. C., c. 109, impose a tax or duty payable in stamps. This section continues such power in the Lieut.-Governor in Council.[5]

6. By this section, whatever powers might have been exercised by any Governor falls to the Governor-General of the

[3] R. v. Amer, 42 U. C. Q. B. 391 (1878), per Wilson, J. See note to § 12.

[4] *Ex parte* Dansereau, 19 L. C. J. 40 (1875). See Cotte's Case, 20 L. C. J. 210 (1875), per Ramsay, J.

[5] A.-G. of Quebec v. Reed, 8 S. C. R. 408 at p. 425, affirmed 10 A. C. 141 (1883).

Dominion, if the subject matter relates to the Dominion of Canada, and falls to the Lieutenant-Governor of Canada if the matter relates to the Province.[6]

SECTION 66 Construes the references in the B. N. A. Act to the Lieutenant-Governor in Council to mean the Provincial Lieutenant-Governor, with the advice of his Executive Council.

As to when Lieutenant-Governors may act independent of their Executive Councils, see notes to § 58.

SECTION 67 Empowers the Governor General in Council to appoint an administrator in case of the absence, illness, or inability of the Lieutenant-Governor.

SECTION 68 Fixes, subject to change by the Executive Government of any Province, the seats of government in the four Provinces as follows:—

Ontario—Toronto.

Quebec—Quebec.

Nova Scotia—Halifax.

New Brunswick—Fredericton.

Sections 69 to 90, inclusive, refer to Legislative Powers (in the Provinces).

1. Sections 69 and 70 affect Ontario.

SECTION 69 Enacts that Ontario shall have a legislature consisting of a Lieutenant-Governor and a Legislative Assembly.

SECTION 70 Fixes the membership of the Ontario Legislature at 82 members, one for each of the electoral divisions set out in Schedule I. to the B. N. A. Act.

By section 92, sub-section 1, the representation has been changed. The membership of the Ontario Legislature is now 94 members.[7] Schedule I. to the Act having been superseded, it is not here reproduced.

[6] St. Catharines Milling and Lumber Co. v. The Queen, 13 S. C. R. 577, affirmed in Privy Council, 14 A. C. 46 (1888).

[7] By R. S. O. (1897) c. 6, §§ 14-18.

2. Sections 71 to 80, inclusive affect Quebec.

SECTION 71 Gives Quebec a legislature of the Lieutenant-Governor and two houses — the Legislative Council and the Legislative Assembly.

**The Provincial Legislatures have as incident to their express powers under the B. N. A. Act the right to summon witnesses, and to punish persons who disobey such summons, this right being necessary to the proper exercise of their powers of legislation, and the control assigned to them in respect of the administration of public affairs. And a Provincial (Q.) Act (35 V. c. 5) regulating this right was held valid.[8]**

SECTION 72 Fixes (subject to change by the Quebec Legislature) the number of Legislative Councillors at 24 (one for each electoral division set out in Schedule A to Con. St. Can., c. 1), each to be appointed by the Lieutenant-Governor in the Queen's name by Patent of Quebec.

**There has been no change yet made under this section.**

SECTION 73 Enacts that the qualifications of Quebec Legislative Councillors shall be the same as the qualifications of Quebec Senators.

**See section 23.**

SECTION 74 Applies the law as to vacancies in the place of a Quebec Senator to vacancies in the place of Quebec Legislative Councillors.

**See sections 23 and 31.**

SECTION 75 Empowers the Lieutenant-Governor in the Queen's name to fill by Patent the vacancies occurring under section 74.

SECTION 76 Empowers the Quebec Legislative Council to decide questions respecting the qualification of a Quebec Legislative Councillor, or a vacancy in the Quebec Legislative Council.

[8] *Ex parte* Dansereau, 19 L. C. Jur. 210 (1875).

SECTION 77 Empowers the Quebec Lieutenant-Governor to appoint by Patent a member of the Quebec Legislative Council to be Speaker thereof.

SECTION 78 Fixes the quorum of the Quebec Legislative Council (subject to change by the Quebec Legislature) at ten members, including the Speaker.

SECTION 79 Declares that voting in the Quebec Legislative Council shall be decided by majority vote,—the Speaker always voting—and in case of an equality in the voices, the question is to be deemed negatived.

See § 36.

SECTION 80 Enacts that the Quebec Legislative Assembly shall have 65 members, one for each of the districts referred to in section 40 of the B. N. A. Act, subject to change by the Quebec Legislature. But no change in those electoral districts set out in Schedule II. to the B. N. A. Act (1867) is to be made unless the Bill for that purpose has been first presented to the Quebec Lieutenant-Governor, has passed its second and third readings in the Legislative Assembly with the concurrence of the majority of the representatives of all those electoral districts, and such fact is shown to the Lieutenant-Governor in an address.

The 65 districts were those set out in Con. St. of L. C. c. 75, and 23 V. c. 1.

The membership of the Quebec Legislature has been changed. It is now 72.[9]

Schedule 2 fixed the limits of 12 districts, but they have been changed as above.

3. Sections 81 to 87, inclusive, affect both Ontario and Quebec.

SECTION 81 Provided for the calling together of the Ontario and Quebec Legislatures not later than six months after the Union.

[9] 53 V. c. 3 (Q.).

This section has been repealed as spent by the Statute Law Revision Act of 1893.[10]

SECTION 82 Empowers the Lieutenant-Governors of Ontario and Quebec to summon in the Queen's name, by Instrument under the Provincial Great Seal, the Provincial Legislatures.

SECTION 83 Disqualifies Ontario and Quebec office holders from sitting in the legislatures of Ontario and Quebec, unless these legislatures otherwise provide. An exception is made in favour of Cabinet Ministers.

See R. S. O. 1897, c. 12, sections 6 to 17, and 62 V. (1) c. 4, § 20, (1899); as to Ontario.

See R. S. Q. articles 136 to 144, as to Quebec.

SECTION 84 Continues, until altered by the Ontario or Quebec Legislatures, the existing Ontario and Quebec Election Laws; and establishes manhood franchise in Algoma.

See as to Ontario, R. S. O. 1897, c. 9 and 11; 60 V. c. 4; 62 V. (1) c. 4, and 62 V. (2) c. 5.

The Crown's prerogative cannot be taken away except by express words, but where a Legislature (Q.) passes an Act (The Quebec Controverted Elections Act of 1875), providing such judgment shall not be susceptible of appeal, held that the intention was to make such decision final; and though the Crown had not been mentioned in such Act, yet the Crown was a party to it, having assented to it, and therefore the prerogative right to admit an appeal was taken away.[1]

SECTION 85 Fixes the duration of the Ontario and Quebec Legislatures at four years from the return of the writs for choosing the same, subject to being sooner dissolved by the Lieutenant-Governor.

R S. O. (1897), c. 12, § 3, fixes this time as four years from the 55th day after the date of the writs for the elections.

[10] 56 V. c. 14 (Imp.).

[1] Theberge v. Landry, 2 A. C. 102 (1876).

SECTION 86 Provides for a yearly session of the Ontario and Quebec Legislatures, each session to begin within twelve months from the end of preceding session.

**This section is re-enacted by R S. O. (1897), c. 12, § 4, as to Ontario.**

SECTION 87 Extends to the Ontario and Quebec Legislatures the following provisions of the B. N. A. Act governing the Canadian House of Commons, i.e., as to election of Speaker, and vacancies in the Speaker's office, his duties, his absence, quorum, and mode of voting.

**See B. N. A. Act §§ 44-49 inclusive, and R. S. O. 1897, c. 12, §§ 38-44, 65 and 66.**

4. Section 88 affects Nova Scotia and New Brunswick.

SECTION 88 Continues the constitution of the legislatures of Nova Scotia and New Brunswick as at the passing of, but subject to, the B. N. A. Act, until altered by the B. N. A. Act, and this section also continued until dissolved or spent the existing New Brunswick House of Assembly.

**The latter part of this section has been repealed as spent, by the Statute Law Revision Act.[2]**

5. Section 89 affects Ontario, Quebec and Nova Scotia.

SECTION 89 Regulated the first Ontario, Quebec, and Nova Scotia elections.

**This section has been repealed as spent by the Statute Revision Act.[3]**

6. Section 90 affects the four Provinces.

SECTION 90 Applies to the legislatures of the several Provinces certain provisions of the B. N. A. Act respecting the Canadian Parliament, with changes of "the

[2] 56 V. c. 14 (Imp.), 1893.

[3] *Ibid.*

Provincial Lieutenant-Governor" for "the Governor-General," of "the Governor-General" for "the Queen," and for "a Secretary of State," of "1 year" for "2 years," and of "the Province" for "Canada." The following are the provisions: Those relating to appropriation and tax bills, the recommendation of money votes, the assent to bills, the disallowance of Acts, and the signification of pleasure on bills reserved.

**The law respecting these provisions is contained in sections 53, 54, 55, 56 and 57 of the B. N. A. Act (1867).**

Part VI. is entitled Distribution of Legislative Powers, and consists of sections 91 to 95, inclusive. The first three of these sections are among the most important in the statute, and as their language has frequently affected their interpretation, they are here copied from the enactment.

The sub-title of section 91 is "Powers of the Parliament," and that of section 92 is "Exclusive Powers of Provincial Legislatures."

**Section 91, which determines the legislative authority of the Canadian Parliament, and section 92 which determines the legislative authority of the Provincial Legislatures, empower both of these bodies, in some particular instances, to legislate upon similar subjects.[4] Apart from this power to legislate concurrently, there is no conflict of jurisdiction although the same words conferring legislative powers are found in both sections.[5] The principles applied by the Courts in determining within which jurisdiction[6] a questioned enactment falls may be summarized in the following Rule:**

**If the questioned enactment fall within any of the particular subjects assigned exclusively by section 92 to the Provincial Legislatures, and also in addition either does not fall within any of the enumerated classes of subjects set out in section 91, or, falling within any of such last mentioned classes, the power of**

**[4] Compare section 91, sub-section 92, with section 92, sub-section 13, and see also Fredericton v. The Queen, 3 S. C. R. 505.**

**[5] Bank of Toronto v. Lambe, 12 A. C. 575, at p. 585; R. v. Robertson, 6 S. C. R. 52; Leprohon v. City of Ottawa, 2 A. R. 522.**

**[6] Dominion or Provincial.**

the Provincial Legislature is not thereby overbourne,[7] then the Provincial Legislature has jurisdiction, but in all other matters within colonial competence,[8] the enactment is within the jurisdiction of the Dominion Parliament.[9]

## INTRODUCTORY CLAUSE.

SECTION 91. "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and Good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say:"

The following general principles have been enunciated respecting these sections and the B. N. A. Act generally.

See the closing clause of this section (Note 2)

See the introductory clause of § 92 (Notes 4 and 6).

1. Laws designed for the promotion of public order, safety or morals, are of a nature which fall within the general authority of Parliament "to make laws for the order and good government of Canada."[10]

2. A questioned enactment is always presumed to be *intra vires*.[1]

3. Sections 91 and 92 must be read together, and the one interpreted and, where necessary, modified by the other.[2]

[7] Dobie v. The Temporalities Board, 7 A. C. 136 (1882).

[8] "In so far as it is not repugnant to Imperial legislation." The Farewell, 7 Q. L. R. 380 (1881); McLeod v. A.-G. of N. S. W. (1891) A. C. 455; R. v. Plowman, 25 O. R. 656 (1895).

[9] Citizens and Queen Ins. Companies v. Parsons, 7 A. C. 96, at p. 109 (1881).

[10] Russell v. R., 7 A. C. 829, at p. 839 (1882).

[1] Valin v. Langlois, 5 A. C. 115 at p. 118 (1879).

[2] Citizens v. Parsons, 7 A. C. 96 at p. 109 (1881); Russell v. The Queen, 7 A. C. 829 at p. 839 (1882).

4. To interpret the various sub-sections, other parts of the Act, and of other Imperial Acts in *pari materia* may be examined.[3]

5. The true nature of the legislation in issue should be ascertained to determine to what class the enactment belongs.[4]

6. Subjects which in one aspect and for one purpose fall within section 92, may for another aspect and another purpose fall within section 91.[5]

7. A legislative power falling within one section (and the jurisdiction of one legislature) shall not be denied an existence because by some possibility it may be abused, or limit the range which otherwise would be open to the other legislature.[6]

8. But where Dominion legislation strictly relating to subjects within section 91 trenches upon maters assigned to the Provincial Legislature, the Dominion legislation is of paramount authority.[7]

9. The Dominion and the Provincial Parliaments possess plenary powers of legislation within their spheres.[8]

10. In all questions of *ultra vires* the enactment in question should not be interpreted any more than is necessary for the decision of the particular question in issue.[9]

11. When the proper construction of the language of the Act is doubtful, the construction put upon it by a legislative authority in its actual legislation may be considered.[10]

12. The state of things existing in the Confederated Provinces at the time of Confederation, and more particularly that which was recognized as law in all or most of the Provinces is a useful guide in interpreting the meaning attached by the Imperial Parliament to indefinite expressions in the B. N. A. Act.[1]

[3] Citizens v. Parsons, 7 A. C. 96 at p. 111 (1881), where an Imperial Act (14 Geo. III., c. 83, § 8), The Quebec Act, is examined for this purpose.

[4] Hodge v. R., 9 A. C. 117 at p. 130 (1883); Russell v. R., 7 A. C. 829, at p. 837 (1882).

[5] Hodge v. R., 9 A. C. 117, at p. 130 (1883).

[6] Bank of Toronto v. Lambe, 12 A. C. 575 at p. 587 (1887).

[7] Tennant v. Union Bank (1894), A. C. 31.

[8] Bennett v. Pharmaceutical Association of Quebec, 1 Dor. Q. A. 336 (1881); Hodge v. R., 46 U. C. Q. B. 141, at p. 150.

[9] Hodge v. R., 9 A. C. 117, at p. 128; same case reported in 46 U. C. Q. B. 141, at pp. 151-2; Citizens v. Parsons, 7 A. C. 96 (1881).

[10] Citizens v. Parsons, 7 A. C. 96 at p. 116 (1881).

[1] Three Rivers v. Sulte, 5 Leg. N. (Q.), 330 (1882).

13. The literal meaning of the words in section 91 will be restricted to afford scope for powers exclusively given to the Provincial Legislatures.[2]

14. Declarations of the Dominion Parliament are not conclusive upon the construction of the B. N. A. Act,[3] but will be heeded.

15. A Provincial (Q.) enactment (38 V. c. 12, § 5), purporting to declare exigible on execution the salaries of Dominion Government employees, concerns public order within this clause, and infringes on the rights of the Dominion Parliament, and is invalid.[4]

16. The clauses of a Provincial (Q.) Statute (39 V. c. 7), imposing a stamp duty on policies of insurance are not authorized by sub-section 2 of § 92, nor do they relate to any matters coming within the classes of subjects assigned exclusively to the Provincial legislatures, and consequently infringe upon the rights of the Dominion Parliament under this clause, and are invalid.[5]

17. A Dominion enactment (37 V. c. 10) imposing new duties on existing Provincial Courts, and giving them powers as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction is not legislation respecting the constitution, maintenance and organization of Provincial Courts within sub-section 14 of § 92, but is within the rights of the Dominion Parliament under this clause, and is *intra vires*.[6]

In other words the Dominion Parliament may take advantage of the existence of any body within a Province to impose duties upon it.

18. A Dominion enactment (41 V. c. 16, § 99), prohibiting traffic in intoxicating liquors, except under certain conditions, in any county or city whose inhabitants take specified steps for the adoption of such act, does not come within any of the matters assigned exclusively to the Provincial Legislatures by any of the

[2] Bank of Toronto v. Lambe, 12 A. C. 575 at p. 586 (1887).

[3] Citizens v. Parsons, 7 A. C. at p. 116 (1881. See also Note 11 under this clause. See also § 92, section 2, Note 12, where an express declaration in a Provincial Statute was followed in construing it.

[4] Evans v. Hudon, 22 L. C. J. 268 (1877).

[5] Attorney-General for Quebec v. Queen Ins. Co., 3 A. C. 1090, (1878); Attorney-General for Quebec v. Reed, 10 A. C. 141 (1883); Plummer Waggon Co. v. Wilson, 3 Man. L. R. 68 (1886); Dulmage v. Douglas, 4 Man. L. R. 495 (1887).

[6] Valin v. Langlois, 5 A. C. 115 (1879).

sub-sections (and particularly by sub-sections 9, 13, 15 or 16), of § 92, and consequently is by this clause within the rights of the Dominion Parliament, and is *intra vires*.[7]

19. An Act (34 V. c. 2) of a Provincial (Q.) Legislature purporting to repeal those sections of the Temperance Act of the old Parliament of Canada of 1864, respecting the prohibition of the sale of intoxicating liquors is not within the powers of the Provincial Legislature within sub-sections 8, 9, 13 or 16 of § 92, but is within the right of the Dominion Parliament within this general residuary introductory clause, and is *ultra vires* of the Provincial Legislature.[8]

This decision must yield to the decisions considered under note 23, *infra*, in so far as it is inconsistent with those decisions.

20. A Dominion Act (31 V. c. 76), providing for the taking in the Provincial Courts, of evidence to be used in actions pending in a foreign court does not infringe upon the powers of the Provincial Legislature under sub-sections 13, 14 or 16, of § 92, but falls within this clause and is *intra vires*.[9]

21. The general power of legislation conferred on the Dominion Parliament by this sub-section in addition to the enumerated powers of such Parliament must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any subjects enumerated in § 92 as within Provincial legislative scope, unless they have attained such dimensions as to affect the body politic of the Dominion.[10]

22. Dominion enactments, when competent, override but cannot directly repeal Provincial legislation. Whether in a particular instance such Dominion Acts have or have not been repealed by repugnancy is a question for adjudication by the tribunals and cannot be determined by either the Dominion Parliament or the Provincial Legislature.[1]

23. The Canada Temperance Act of 1886 so far as it purported to repeal the prohibitory clauses of the Act of the old Province of Canada (27 & 28 V. c. 18, 1864), is *ultra vires* of the Dominion Parliament, but its own enacting (as distinguished from repealing) provisions are valid when duly brought into operation

[7] Russell v. R., 7 A. C. 829 (1882).

[8] Griffith v. Rioux, 6 Q. L. News, 211 (1883).

[9] Re Wetherell and Jones, 4 O. R. 713 (1883).

[10] Attorney-General of Ontario v. Attorney-General for the Dominion (1896), A. C. 348.

[1] *Ibid.*

in any provincial area, the same being legislation respecting the peace, order and good government of Canada, within this clause, but is not legislation respecting trade and commerce (§ 91, subsection 2).[2]

See note 19, *supra*.

The rights of the Dominion and of the Provinces respecting legislation affecting spirituous, fermented and other intoxicating liquors are as follows:—

(*a*) The Provinces can impose reasonable conditions on licensees in the nature of a regulation. (Hodge v. The Queen).

(*b*) The Provinces can compel a brewer to take out a license to sell liquor wholesale in the Province—the same coming under the B. N. A. Act, § 92, sub-sections 2 and 9. (Brewers' and Maltsters' Association v. Attorney-General for Ontario, 1897 [A.C.] 231).

(*c*) The Provinces cannot abolish the sources from which the revenue is to be raised. (Attorney-General of Ontario v. Attorney-General for the Dominion, 1896 [A.C.] 348, at p. 364).

(*d*) The Provinces can prohibit retail transactions and restrict the consumption of liquor within the ambit of the Province, so long as they do not affect transactions in liquor between persons in the Province and persons in other Provinces or in foreign countries, as being legislation affecting property and civil rights in the Province, and also so long as Dominion legislation does not supersede such prohibition (*Ibid*, at p. 364).

(*e*) The Dominion Parliament cannot imperatively enact a prohibitory law adapted and confined to the requirements of localities within the Province where Prohibition was urgently needed. (*Ibid*, at p. 365).

(*f*) The old Temperance Act of 1864 was passed for Upper Canada (now Ontario), and being confined to that Province is the same as Provincial legislation, and could not have been enacted by the Dominion Parliament, but only by the Provincial Legislature. Neither the Dominion Parliament nor the Provincial Legislature can validly repeal legislation they cannot enact, hence the Temperance Act of 1864 could be repealed only by the Provincial Legislature. (It is for this reason, particularly, that the statute considered in this note [23] was held *ultra vires* of the Dominion Parliament.) (*Ibid*, at p. 367).

(*g*) But if the Dominion Parliament passed an Act (within its powers) inconsistent with the Act of 1864, the Act of 1864 would yield, to the extent of the inconsistency, to the Dominion legis-

[2] *Ibid.*

tion, and remain in abeyance until the Dominion legislation is properly repealed. (*Ibid*, at p. 367).

(*h*) The Provinces can prohibit the manufacture of liquor in a Province if such manufacture were carried on in such a way as to make its prohibition a local matter within the Province. (*Ibid*).

(*i*) The Provincial Legislatures cannot prohibit the importaiton of liquors into the Province. (*Ibid*).

24. The provisions in a Provincial (Q.) Act (38 V. c. 64), repealing an Act of the Parliament of old Canada (22 V. c. 66), which created a corporation (the Board for the Management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland), to exist in Ontario and Quebec, are not legislation respecting any subject over which the Provinces have, by § 92 (sub-sections 7, 11 or 13, or any other sub-section), jurisdiction, and consequently such provisions are *ultra vires* even though accompanied by concurrent legislation on the part of the other Province interested.[3]

In other words where a business extends to two Provinces, legislation affecting it must emanate from the Dominion Parliament—concurrent legislation by the two interested Provinces is not sufficient.

25. A Dominion Statute (The Electoral Franchise Act) relating to the duties of a Revising Officer in connection with the election of members to serve in the Dominion Parliament, does not interfere with the right of the Province respecting property and civil rights in the Province (§ 92, sub-section 13), and is valid under this clause.[4]

26. Where plenary powers of legislation exist (as in Canada) they may be exercised either absolutely or conditionally (*i.e.*, by leaving details to the discretion of some external authority).[5]

27. The Colonial Legislatures are not delegates of the Imperial Parliament. They are restricted in the area of their powers, but within that area they are unrestricted. They also have plenary powers.[6]

28. A Dominion Act (34-35 V. c. 28) authorizing the Dominion Parliament to provide for the administration, peace, order and

[3] Dobie v. The Temporalities Board, 7 A. C. 136 (1882).

[4] Re North Perth, Hessin v. Lloyd, 21 O. R. 538 (1892), not following Re Simmons and Dalton, 12 O. R. 505 (1886).

[5] R. v. Burah, 3 A. C. 889 (1878).

[6] Powell v. Apollo Candle Co.'y, Ltd., 10 A. C. 282 (1885).

good government in any territory (not included in any Province), vests in that Parliament the utmost discretion for the attainment of those objects, and a statute of the Dominion Parliament (43 V. c. 25) providing therefor is valid.[7]

## SUB-SECTION 1. The Public Debt and Property.

## SUB-SECTION 2. The Regulation of Trade and Commerce.

See § 91, introductory clause, Notes 19 and 23.

See § 91, sub-section 3, Note 3.

See § 91, sub-section 8, Notes 2 and 10.

See § 92, introductory clause, Note 8.

See § 92, sub-section 8, Note 15.

See § 92, sub-section 9, Notes 5, 8, 14 and 15.

See § 92, sub-section 13, Notes 4, 6 and 16.

1. This sub-section does not extend to the regulation of the contracts of a particular business in a single Province.[8]

2. And this sub-section does not prevent a Provincial Legislature from levying taxes on commercial corporations created by the Dominion Parliament.[9]

3. And this is so whether the institution is incorporated by Imperial, Dominion, Provincial, Colonial or Foreign authority.[10]

4. Nor does the fact of such company having obtained a license from a Dominion officer (the Minister of Finance) before being allowed to carry on business in the Dominion (such a course being required by a Dominion statute 38 V. c. 20), serve to withdraw the company from the operation of the Provincial Act.[1]

5. A Provincial (O.) Act (33 V. c. 19) to the effect that all rights of suit should pass to the consignee or endorsee of a bill of lading, and that such an instrument representing the goods shipped, should, in favour of a holder for value, be conclusive

[7] Riel v. R., 10 A. C. 675 (1885).

[8] Citizens v. Parsons, 7 A. C. 96 (1881), but see however § 92, sub-section 11, Note 4.

[9] Billington v. Provincial Insurance Co., 3 S. C. R. 182 (1879); Dear v. Western Assurance Company, 41 U. C. Q. B. 553 (1877); Bank of Toronto v. Lambe, 12 A. C. 575 (1887).

[10] Citizens v. Parsons, 7 A. C. 96 (1881).

[1] *Ibid.* See § 91, sub-section 2, Note 11.

evidence of shipment as against the consignor, does not interfere with trade and commerce under this sub-section and is valid.[2]

6. A Provincial (Q.) Act (Art. 1086 of Municipal Code), purporting to repeal those sections of the Temperance Act of the old Province of Canada (27-28 V. c. 18, 1864), which conferred on Municipal Councils the power to pass by-laws prohibiting the sale of intoxicating liquors, invades the right of the Dominion Parliament to legislate respecting trade and commerce, and is invalid.[3]

This decision must yield to the decisions considered under Note 19 to the introductory clause of this §, in so far as it is inconsistent with those decisions.

7. A Dominion Act (32-33 V. c. 16, the Insolvent Act of Canada) empowering an official assignee or his agent to auction the bankrupt's goods without taking out a license and paying a tax on the sum realized from the sale, as required by a Provincial (Q.) Statute (34 V. c. 2), is within the power of the Dominion Parliament under this sub-section, rather than under § 91, subsection 21, and the Provincial Act is invalid to the extent to which it conflicts with such Dominion enactment.[4]

8. Legislation respecting trade and commerce must necessarily affect to some extent property and civil rights, over which the Provincial Legislatures have (§ 92, sub-section 13), jurisdiction.[5]

9. The right to regulate trade and commerce is not to be overridden by any local legislation in reference to any subject over which power is given to the Local Legislature, and in such a case the law of the Local Legislature must yield to that of the Dominion Parliament.[6]

10. A Dominion statute (The Canada Temperance Act of 1878) for the general regulation of the traffic in intoxicating liquors throughout the Dominion is not an Act within property and civil rights, under sub-section 12 of § 92, but it may be for the regulation of trade and commerce.[7]

[2] Beard v. Steele, 34 U. C. Q. B. 43 (1873).

[3] Hart v. Missisquoi, 3 Q. L. R. 170 (1876); Covey v. Brome, 21 L. C. J. 182 (1877).

[4] Cote v. Watson, 3 Q. L. R. 157 (1877).

[5] Smith v. Merchants Bank, 25 Gr. Chy. 129 (1881).

[6] Fredericton v. R., 3 S. C. R. 505, at p. 540 (1882); Blouin v. Quebec, 7 Q. L. R. 18 (1880).

[7] Russell v. R., 7 A. C. 829 (1882); see § 91, introductory clause, Note 18.

11. Dominion statutes (31 V. c. 48, and 34 V. c. 9), providing that insurance companies doing business in Canada should make a deposit with the Finance Minister for Canada for the security of Canadian policyholders are within the power of the Dominion Parliament under this sub-section.[8]

12. The sections of a Provincial (Q.) Statute (License Act of 1878), prohibiting, directly or indirectly, the manufacture or sale of spiritous liquors or other articles of commerce, or conferring authority for that purpose on Municipal Councils come within this sub-section and are invalid.[9]

(The observations following note 6, *supra*, apply to this note.)

13. The power of the Dominion Parliament under this sub-section includes political arrangements in regard to trade and regulations of trade in matters of inter-provincial concern, and perhaps general regulations affecting the whole Dominion.[10]

14. A Provincial (N.B.) Statute (34 V. c. 6), prohibiting the issue of a liquor license into any municipality where a majority of the ratepayers petition the Sessions or Municipal Council against it is legislation respecting trade and commerce, and does not infringe on the rights of the Province to legislate respecting licenses (§ 92, sub-section 9), and is valid.[1]

15. A municipal by-law authorized by Act of the late Province of Canada (27-28 V. c. 18, The Canada Temperance Act), does not infringe on this sub-section, and such Act continues as provided by § 129 of the B. N. A. Act.[2]

## SUB-SECTION 3. The Raising of Money by any mode or system of Taxation.

1. The Dominion Parliament is empowered to raise money by any mode of taxation direct or indirect.[3]

2. This sub-section does not give the Dominion Parliament power to make laws regarding direct taxation within a Province to raise a Provincial revenue[4]; nor regarding the borrowing of money on the sole credit of a Province[5]; nor regarding shop,

[8] Re Briton Med. & Gen. Life Assurance (Ltd.), 12 O. R. 441 (1886).

[9] De St. Aubyn v. Lafrance, 8 Q. L. R. 190 (1882).

[10] Citizens v. Parsons, 7 A. C. 96 (1881).

[1] R. v. Justices of King's, 2 Pugs. 525 (1875).

[2] Noel v. Richmond, 1 Dor. Q. A. 333 (1881).

[3] Dow v. Black, L. R. 6 P. C. 272, at p. 282 (1875).

[4] B. N. A. Act, § 92, sub-section 2.

[5] B. N. A. Act, § 92, sub-section 3.

saloon, tavern, auctioneer and other licenses, to raise a Provincial revenue,[6] in such cases the power of the Province is not overbourne by this sub-section.[7]

3. The formation of a revenue by taxation is under the exclusive control of the Parliament of Canada, by this sub-section, and § 91, sub-section 2.[8]

4. The right of the Dominion Parliament to raise money by any mode or system of taxation under this sub-section is exclusive when not coming within the classes of subjects assigned to the Provincial Legislatures, and as the Provincial Legislatures are only authorized to raise a revenue by direct taxation, and the sources of revenue mentioned in § 92 and sections 2, 5, 10 and 15, it follows that the Dominion Parliament has the exclusive right to raise a revenue by means of indirect taxes, and the Provincial Legislatures have no such right.[9] A plan to evade this decision has been discovered and adopted in Manitoba.[10]

5. This sub-section while sufficiently large and general to include direct taxation within the Province in order to the raising of a revenue for Provincial purposes, assigned by § 92, sub-section 2, to the Provincial Legislatures, is not intended to override the particular power of the Provinces as given by that sub-section.[1]

## SUB-SECTION 4. The Borrowing of Money on the Public Credit.

See § 91, sub-section 12, Note 5.

## SUB-SECTION 5. Postal Service.

## SUB-SECTION 6. The Census and Statistics.

See § 8 of the B. N. A. Act, where provision is made for a Dominion decennial census.

## SUB-SECTION 7. Militia, Military and Naval Service and Defence.

[6] B. N. A. Act, § 92, sub-section 9.

[7] See § 91, introductory clause, Note 7.

[8] Hart v. Missisquoi, 3 Q. L. R. 170, at p. 172 (1876).

[9] Attorney-General of Quebec v. Reed, 10 A. C. 141 (1883). See judgment of Ritchie, C.J. (8 S. C. R. 408 at p. 416), affirmed in the Privy Council.

[10] See § 92, sub-section 2, Note 12.

[1] Bank of Toronto v. Lambe, 12 A. C. 575, at p. 585 (1887).

The matters covered by this sub-section are the most important concerning which the Imperial authorities continue to exercise the control over Colonial Legislation.

It has been held[2] that the Dominion Parliament has exclusive jurisdiction over the matters covered by this sub-section. But the learned Judge who decided this case (Chauveau, J.), did not hold, as Mr. Clement states[3] he "apparently did," that the Imperial Parliament is deprived of jurisdiction to legislate respecting the Militia and the Navy.[4] It is submitted that this exclusive jurisdiction exists as against the Provincal Legislatures and not as against the Imperial Parliament; and the judgment of Chauveau, J., is easily capable of this interpretation.

SUB-SECTION 8. 1. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

2. A Dominion official doing duty for the Dominion in a Province is out of the reach of the taxation of that Province.[5]

3. And an Imperial official is in the same position.[6]

4. The Provincial Legislature cannot tax the means by which the Dominion Government is carried on, nor declare exigible the salaries of Dominion Government employees.[7]

5. Their salaries are not "property within the Province" under § 92, sub-section 13.[8]

6. (Salaries of government officials are at Common Law exempt from attachment whether in the Dominion or in the Province.[9]

By a recent Ontario Statute[10] the Common Law has been altered so as to admit of the attachment, by special process, of the salaries of Provincial officers).

[2] Holmes v. Temple, 8 Que. L. R. 351 (1882).

[3] Law of the Canadian Constitution, 1892, at p. 379.

[4] See Holmes v. Temple, 8 Quebec L. R. 351 (1882), at p. 353.

[5] Leprohon v. Ottawa, 2 A. R. 522 (1877-1878).

[6] *Ibid*, at p. 531.

[7] *Ibid.*

[8] *Ibid.*

[9] R. v. McFarlane, 7 S. C. R. 216; Gidley v. Lord Palmerston, 3 B. & B. 275 (1822).

[10] 61 V. c. 7 (1898).

7. The Dominion Government can impose taxes on Provincial officers.[1]

## SUB-SECTION 9. Beacons, buoys, light-houses and Sable Island.

## SUB-SECTION 10. Navigation and Shipping.

See § 91, sub-section 2, Note 4.

See § 92, sub-section 8, Note 16.

See § 92, sub-section 10, Note 8.

See § 92, sub-section 16, Notes 5 and 10.

1. A Provincial Legislature cannot under sub-section 10 of § 92, interfere with the requirements of navigation or commerce.[2]

2. The Dominion Parliament can confer on the Vice-Admiralty Courts jurisdiction in any matter of navigation and shipping within the territorial limits of the Dominion.[3]

3. The Province may incorporate a boom company, but cannot confer upon the company power to obstruct the navigation of a tidal and navigable river.[4]

4. Navigable rivers for the purposes of navigation are under the control of the Dominion Parliament.[5]

5. The legislative control of navigable, tidal waters is in the Dominion Parliament exclusively.[6]

6. The power to legislate respecting navigation conferred on the Dominion Parliament includes the exclusive right to legislate so as to authorize an obstruction in a navigable public river where the tide ebbs and flows.[7]

7. Taking away the right to navigate from the public is a matter relating to navigation.[8]

[1] B. N. A. Act, § 91, sub-section 3.

[2] Normand v. St. Lawrence Navigation Co., 5 Q. L. R. 215 (1879).

[3] The Farewell, 7 Q. L. R. 380 (1881).

[4] The Queddy River Driving Boom Co. v. Davidson, 10 S. C. R. 122, overruling McMillan v. S. W. Boom Co., 18 Q. B. 715 (1878).

[5] Central Vermont Ry. v. Town of St. Johns, 14 S. C. R. 288, per Fouriner, J., at p. 297 (1887).

[6] Queddy R. D. B. Co. v. Davidson, 10 S. C. R. 222, at p. 232.

[7] *Ibid*, at p. 235.

[8] The judgment of Palmer, J., at 3 Cart., p. 261.

8. Navigation and shipping do not mean the river itself. The river itself is not under the control of the Dominion Parliament, but belongs to the local Crown domains.[9]

9. Where, by a Provincial (N.S.) Act (R. S. N. S. 5 Ser. c. 7), passed before Confederation, authority is given to the Crown to permit an interference with the public rights of navigation, such authority is exercisable by the Governor-General and not the Provincial Lieut.-Governor.

10. A Crown grant derogating from the public right of navigation is void to that extent as interfering with the authority of the Dominion Parliament respecting navigation and shipping, and the Provinces cannot legislate such an interference.

11. A Dominion Act (40 V. c. 21) establishing a Maritime Court with jurisdiction limited as to the Province of Ontario is within the powers of the Dominion Parliament under this sub-section.[a]

12. A Dominion Act (R. S. C. 1886, c. 92), respecting works to be constructed in or over navigable waters is legislation respecting navigation within this sub-section and is valid.[8]

## SUB-SECTION 11. Quarantine and the establishment and maintenance of Marine Hospitals.

## SUB-SECTION 12. Sea-coast and Inland Fisheries.

1. The expression "Inland Fisheries" confers on the Dominion Parliament no power to take away exclusive rights of fishery vested in private proprietors of non-navigable rivers.[4]

2. This sub-section does not confer on the Dominion Parliament authority to deal with questions of property and civil rights, such as the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein.[5]

[9] Central Vermont Ry. v. St. Johns, M. L. R. 4 Q. B. 466 at p. 453, affirmed in Supreme Court of Canada (14 S. C. R. 288) and in the Privy Council (14 A. C. 590), (1887).

[10] R. v. Fisher, 2 Ex. C. R. 365 (1891).

[1] *Ibid.*

[2] The Picton, 4 S. C. R. 648 (1879).

[3] Attorney-General for Canada v. Attorney-General for Ontario (Fisheries Case), (1898) A. C. 700 at p. 717.

[4] R. v. Robertson, 6 S. C. R. 52 at p. 134 (1882).

[5] R. v. Robertson, 6 S. C. R. 52.

3. This sub-section confers on the Dominion Parliament a right to legislate regarding matters of national and general concern, such as the forbidding of fish to be taken at improper seasons, or in an improper manner, or with destructve instruments, such general laws being for the benefit of the public at large as well as of the owner.[6]

4. This sub-section does not empower the Dominion Parliament to enable its officers to make a lease of a non-navigable portion of a river passing partly through granted and partly through ungranted lands.[7]

5. Whatever proprietary rights vested in the Provinces at Confederation remained so unless by express enactment transferred to Canada. Such transfer is not to be presumed from the grant of legislative jurisdiction to Canada in respect of the subject matter of these proprietary rights.

Held, that the transfer by § 108, sub-section 5 of the schedule thereto to the Dominion of "rivers and lake improvements" operates in regard to the improvements only, both of rivers and lakes and not in regard to the entire rivers.

The transfer of "public harbours" operates on whatever properly falls within that term, and is not limited to those parts whereon public works had been executed. The circumstances of each case must be considered in arriving at the conclusion whether or not the harbour is public.

Regarding fisheries and fishing rights:—

(*a*) The Dominion has no proprietary rights therein, but the Dominion may unlimitedly affect those rights, only it cannot transfer them.

(*b*) The Dominion may impose a tax by way of license as a condition of the right to fish, by § 91, sub-sections 4 and 12.

(*c*) The Provinces may also, under § 92, sub-section 2.

(*d*) The Dominion Act (R. S. C. c. 95, § 4), as far as it empowers the grant of exclusive fishing rights over Provincial property is *ultra vires*.

(*e*) The Provincial enactment (R. S. O. c. 24, § 47), declaring that it has been and shall be lawful for the Provincial Lieutenant-Governor in Council to authorize sales or appropriation of land covered with water in the harbours, rivers and other navigable waters in Ontario, under such conditions as do not interfere with

[6] R. v. Robertson, 6 S. C. R. 52 (1882).

[7] *Ibid.*

the harbour, as such, or with navigation therein, or in any river or other navigable water, is *ultra vires* of the Provincial Legislature, "except in so far as it relates to land in the harbours and canals," if any of the latter be included in the words "other navigable waters of Ontario."

(*f*) The Ontario Act of 1892 for the Protection of Provincial Fisheries (55 V. c. 10), sections 5 to 13 inclusive, and sections 19 to 21 inclusive, as far as they affect fishing regulations and restrictions, are *ultra vires* of the Provincial Legislature, as infringing on § 91, sub-section 12.

(*g*) The Dominion Act respecting works constructed in or over navigable rivers (R. S. C. 1886, c. 92), is valid, as relating to navigation.[8]

## SUB-SECTION 13. Ferries between a Province and any British or Foreign country or between two Provinces.

See § 92, sub-section 2, Note 14.

See § 92, sub-section 16, Note 7.

1. A Provincial (Q.) Act (39 V. c. 52) conferring on municipalities the right to tax ferrymen and ferries does not interfere with the authority of the Dominion Parliament under this sub-section.[9]

2. A ferry between two points in a Province is under the control of the Provincial Legislature.[10]

## SUB-SECTION 14. Currency and coinage.

R. S. C. (1886) c. 30, contains the Canadian legislation on this subject.

## SUB-SECTION 15. Banking, Incorporation of Banks and the Issue of Paper Money.

See § 91, sub-section 21, Notes 15 and 16.

1. This sub-section does not deprive a Provincial Legislature of the power of imposing a tax on banks carrying on business

[8] Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia, (1898) A. C. 700.

[9] Longueuil Navigation Co.'y v. Montreal, 15 S. C. R. 566 (1888).

[10] Dumer v. Humberstone, 26 S. C. R. 266 (1896); § 92, sub-section 10 (a)

within the Province, such a tax being direct taxation within sub-section 2 of § 92.[1]

2. The power of the Dominion Parliament to make laws on the subject of banking does not interfere with the power of the Provincial Legislature to make banks contribute to the public objects of the Province where they carry on business.[2]

3. No lands nor property belonging to the Dominion of Canada can be taxed.[3]

4. But notes which the Dominion Government have exchanged for gold and other things do not belong to the Dominion of Canada.[4]

5. Hence this sub-section does not prevent a Provincial Legislature enacting a law imposing a tax on the Dominion notes held by a bank as a portion of its cash reserve.[5]

6. Legislation upon banking must necessarily affect to some extent property and civil rights over which subjects the Provincial Legislatures have by § 92, sub-section 13, control.

7. A Dominion Act (34 V. c. 5, § 46), authorizing the transfer of warehouse receipts to banks by direct endorsement is within the powers of the Dominion Parliament.[7]

8. Under this sub-section the Dominion Parliament can legislate over every transaction within the legitimate business of a banker, though the exercise of this power may interfere with property and civil rights in a Province (§ 92, sub-section 13), and give the bank lending privileges unrecognized by the Provincial law; and the Bank Act of Canada is *intra vires* of the Dominion Parliament.[8]

9. A Dominion Act (53 V. c. 31, 1890), (The Bank Act), authorizing a bank to take warehouse receipts as security in the course of banking is *intra vires* of the Dominion Parliament within this sub-section.[9]

[1] Bank of Toronto v. Lambe, 12 A. C. 575 (1887).

[2] *Ibid*, at p. 586.

[3] B. N. A. Act, § 125.

[4] Bank v. Supervisors, 7 Wallace, 26 (1868).

[5] Town of Windsor v. Commercial Bank of Windsor, 3 R. & G. 420 (1882).

[6] Smith v. Merchants Bank, 28 Gr. 629 (1881).

[7] Smith v. Merchants Bank, 28 Gr. 629 (1881).

[8] Tennant v. Union Bank (1894), A. C. 31.

[9] *Ibid*.

## SUB-SECTION 16. Savings Banks.

## SUB-SECTION 17. Weights and Measures.

## SUB-SECTION 18. Bills of Exchange and Promissory Notes.

The Dominion Statute, 53 V. c. 33 (1890), and its amendments, codify the law on this subject.

## SUB-SECTION 19. Interest.

See § 92, sub-section 16, Note 5.

1. An Act (The Municipal Act) of a Provincial (Man.) Legislature, to the effect that an additional rate or percentage should be added to taxes after date of payment does not infringe on the right given to the Dominion Parliament by this sub-section, the same not being interest but a penalty for the enforcing of a Provincial law under sub-section 18 of § 92, respecting municipal institutions in the Province.[10]

2. The interest which the Dominion Parliament was intended to deal with is that in connection with debts originating in contract.[1]

3. The right of the Dominion Parliament under this sub-section is not intended to conflict with that of the Provincial Legislatures in matters of assessment or taxation respecting municipal institutions (under § 92, sub-section 8), either in the manner or extent to which the Provincial Legislatures should authorize such assessment to be made.[2]

4. General legislation respecting interest is all that is by this sub-section reserved to the Dominion Parliament.[3]

## SUB-SECTION 20. Legal Tender.

## SUB-SECTION 21. Bankruptcy and Insolvency.

See § 91, sub-section 2, Note 7.

See § 92, sub-section 13, Notes 8, 9, 13, 14, 15, 16.

See § 92, sub-section 15, Note 6.

See § 92, sub-section 16, Note 6.

[10] Lynch v. Canada N. W. Land Co., S. Dufferin v. Morden. Gibbins v. Barber, 19 S. C. R. 204 (1892) overruling Ross v. Torrance, 2 L. N. 186.

[1] *Ibid.*

[2] *Ibid.*

[3] Royal Can. Ins. Co. v. Montreal Warehousing Co., 3 Q. L. N. 155 (1880).

1 The Dominion Parliament in legislating on Bankruptcy and Insolvency may interfere with property and civil rights (§ 92, sub-section 13), and procedure in the Provinces (§ 92, sub-section 14), so far as a general law on these subjects might affect them.[4]

2. *Quære*, if a Provincial Act may not take a particular association out of the operation of a general bankruptcy law passed by the Dominion Parliament.[5]

3. A Provincial (N.B.) Act (Act of March 23, 1868), amending c. 124, Title 34 of Rev. Stat. re Insolvent Confined Debtors), providing for the examination of a debtor before a Judge, and authorizing the Judge to grant the debtor a discharge from gaol or confinement on proof of inability to pay his debts and absence of fraud, was held to be an insolvent Act, and to infringe on the rights of the Dominion Parliament under this sub-section, and was consequently held to be invalid.[6] On this decision much doubt has been cast,[7] and the probability is that the decision in this case must be modified so as to accord with the rule laid down in Clarkson v. Ontario Bank.[8]

4. A Provincial (N.B.) enactment (30 V. c. 28), passed prior to the Union, extending gaol limits, and to come in force on a date after the Union, was repealed by an Act (31 V. c. 29) of the same Province (N.B.) before it came in force, but after the Union. Held, that the repealing Act was not insolvency legislation and was *intra vires* of the Provincial Legislature as being legislation affecting property and civil rights (§ 92, sub-section 13).[9]

5. A Provincial (N.B.) Act (37 V. c. 7) abolishing imprisonment for debt is not insolvency legislation as respects a person not a trader or subject to the Dominion Insolvent Act, the same probably coming within § 92, sub-section 14, and is *intra vires* of the Provincial Legislature.[10]

6. A Dominion enactment (32-33 V. c. 15, § 89, The Insolvent Act), abolishing priority of executions in a case where an assignment for the benefit of creditors had been made, or where the debtor's estate had been placed in liquidation, is

[4] Cushing v. Dupuy, 5 A. C. 409 (1880); Peek v. Shields, 6 A. R. 639 (1881).

[5] L'Union St. Jacques de Montreal v. Belisle, L. R. 6 P. C. 31 (1874).

[6] R. v. Chandler, 1 Han. 556 (1868).

[7] Clarkson v. Ontario Bank, 15 A. R. 166, at pp. 201-202 (1888).

[8] See Note 13 to sub-section 13 of § 92.

[9] McAlmon v. Pine, 2 Pugs. 44 (1874).

[10] Armstrong v. McCutcheon, 2 Pugs. 381 (1874).

within the authority of the Dominion Parliament under this sub-section, even though it interferes with the right of the Provinces to legislate regarding property and civil rights (§ 92, sub-section 13).[1]

7. Such an Act (Dominion) must necessarily conflict with previously existing legal rights, and insolvency is a subject over which the Dominion Parliament has exclusive jurisdiction, even to the extent of overruling Provincial enactments on the same subject.[2]

Respecting this subject. the law seems to be that so long as, and in so far as, the Dominion Parliament fails to legislate regarding bankruptcy and insolvency, the Provincial Legislatures have this concurrent right; but the legislation of the Dominion Parliament, on this subject, so far as it goes supersedes the legislation of a Province.

8. A provision in such Act (Dominion) empowering a County Court Judge to dispose of claims by petition is within the power of the Dominion Parliament to enact.[3]

9. A provision in a Provincial (P.E.I.) Indigent Debtors Act 39 V. c. 9), providing for the discharge of an insolvent debtor infringes on the rights of the Dominion Parliament under this sub-section and is invalid.[4]

10. The provisions of a Provincial (N.S.) Act (37 V. c. 104) to facilitate arrangements with a railway's company's other creditors by empowering a Court under certain circumstances to restrain an action against the debtors, is insolvency legislation within this sub-section, and such provisions are invalid.[5]

Mr. Clement in his work on The Law of the Canadian Constitution (1892) p. 400, considers this decision overruled by the decision *In re* Windsor & Ann. Ry., 4 Rus. & Gel. 312 (1883), noted in § 92, sub-section 13, Note 15. See that reference, where for the reasons there stated it is submitted this judgment is still a binding authority.

11. A Dominion enactment (42 V. c. 48) assuming to provide for the liquidation of all building societies in a province, whether

[1] Kinney v. Dudman, 2 Rus. & Chel. 19 (1876). See Note 13 to sub-section 13 of § 92, post.

[2] *Ibid.*

[3] Crombie v. Jackson, 34 U. C. Q. B. 575 (1874).

[4] Munn v. McCannell, 2 P. E. I. R. 148 (1877).

[5] Murdock v. Windsor & Annapolis Ry. Co. (Russ. Eq. R. 137), 1877.

solvent or not, invades the powers of the Provincial Legislatures under sub-section 13 of § 92, and is *ultra vires* of the Dominion Parliament.[6]

12. A provision in a Dominion Act (40 V. c. 41, § 28), enacting that the judgment of the Court of Appeal in matters of insolvency should be final is within this sub-section, and is not within sub-sections 13 and 14 of § 92, and such provision is valid.[7]

13. The Dominion Parliament can, under this sub-section provide for the compulsory liquidation or winding up of a company by a Provincial Legislature.[8]

14. And also of a company incorporated by an Imperial Act.[9]

15. A provision in the Dominion Winding-up Act (R. S. C. 1886, c. 129), extending that Act to incorporated trading companies, wheresoever incorporated, and doing business in Canada is insolvency legislation, and is therefore *intra vires* of the Canadian Parliament.[10]

16. The Dominion Parliament has a right to pass an Act (31 V. c. 17) to incorporate trustees, giving them authority to carry on the business of an insolvent bank, so far as it is necessary to wind up same. And it can also pass an Act vesting in the Dominion Government the bank's property held by the trustees.[1]

Per Ritchie, C.J.—It is the sub-sections referring to banking and the incorporation of banks,[2] and to bankruptcy and insolvency which give the Dominion Parliament power to pass these Acts.

Per Strong, Taschereau and Patterson, JJ.—It is the sub-section referring to bankruptcy and insolvency, and not that referring to banking and the incorporation of banks which gives the Dominion Parliament this power.

There is now no Dominion Insolvency Act, the same having been repealed in 1880,[3] and consequently many of the decisions on this sub-section are at present of historical interest only. They may, however, be of use should the insolvency legislation of Canada be restored.

[6] McClanaghan v. St. Ann's, 24 L. C. J. 162 (1880).

[7] Cushing v. Dupuy, 5 A. C. 409 (1880).

[8] Schoolbred v. Clarke, 17 S. C. R. 265 (1890).

[9] Allen v. Hansom, 18 S. C. R. 667 (1890).

[10] *Ibid*, at pp. 672-3-7.

[1] Quirt v. R., 19 S. C. R. 510 (1891).

[2] § Sub-section 15.

[3] 43 Vict. c. 1 (Dom.).

## SUB-SECTION 22. Patents of Invention and Discovery.

1. Under this sub-section the Dominion Parliament has power to regulate procedure in patent litigation.[4]

2. Procedure in the nature of a writ of scire facias to set aside letters patent granted under a Dominion Act should be instituted in the name of the Provincial Attorney-General.[5] But a Court of co-ordinate jurisdiction has held that such a proceeding should be instituted in the name of the Attorney-General for Canada.[6]

3. Patents are property and civil rights (see § 92, sub-section 13), in the Province where the holder is domiciled, yet they confer rights exercisable in any Province of the Dominion, and as a matter of policy the legislation on the subject is in the general (Dominion) government.[7]

## SUB-SECTION 23. Copyright.

1. Canada as distinguished from the legislatures has exclusive control of colonial copyright within the Dominion, but this does not control the paramount authority of the Imperial Parliament.[8]

2. The Canadian Parliament has no greater power respecting copyright than had the Provincial Legislatures prior to Confederation.[9]

3. The Imperial Copyright Act (5 & 6 V. c. 45) was in force in Canada at Confederation and remained so afterwards, and is not affected by the Canadian Copyright Act of 1875 (now R. S. C. 1886, *c.* 62), which is also in force.[10]

4. A Canadian copyright obtained prior to publication of a copyright in England, completely secures the possessor thereof against all interference in Canada even against English reproductions or copies made under a subsequent British copyright.[1]

[4] Aitcheson v. Mann, 9 P. R. 473 (1883); Re Bell Telephone Co., 7 O. R. 605 (1884).

[5] Re Pattee, 8 P. R. 292 (1871).

[6] Mousseau v. Bate, 27 L. C. Jur. 153 (1883).

[7] Re Bell Telephone Co., 7 O. R. 605, at p. 611 (1884).

[8] Smiles v. Belford, 1 A. R. 436 (1876).

[9] *Ibid.*

[10] *Ibid.*

[1] Anglo-Canadian Music Publishers v. Suckling, 17 O. R. 239 (1889).

## SUB-SECTION 24. Indians and Lands Reserved for the Indians.

1. This sub-section applies to lands reserved for the Indians which have not been surrendered by the Indians, and does not include lands to which the Indians' title has been extinguished.[1]

2. All lands reserved for Indians are under the control of the Dominion Parliament. But upon the estate of the Crown being freed from the Indian titles, the beneficial interest in the lands accrues to the Provinces in which they are located.[2]

3. Moneys due in respect of Indian lands may be recovered by the Dominion.[4]

4. The Dominion Parliament's power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.[5]

## SUB-SECTION 25. Naturalization and Aliens.

## SUB-SECTION 26. Marriage and Divorce.

This sub-section is cut down by sub-section 12 of § 92.

## SUB-SECTION 27. The Criminal Law except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.

See section 92, sub-section 8, Note 8.
See section 92, sub-section 14, Notes 2, 5, 6, 12, 13.
See section 92, sub-section 15, Note 6.
See section 92, sub-section 16, Note 8.

1. The whole criminal law of Canada was codified in 1892.[6]

2. The provision of a Provincial (O.) Law (32 V. c. 32) that a compromise of a contravention thereof shall be punishable by imprisonment does not infringe on this sub-section, the same not being part of the criminal law existing independently of the Provincial enactment creating the offence, but being within the powers of the Province under § 92, sub-sections 9, 15 and 16.[7]

See next note.

[2] Church v. Fenton, 5 S. C. R. 239 (1880).

[3] St. Catharines Milling and Lumber Co. v. R., 14 A. C. 46 (1888).

[4] Mowat, A.G. v. Casgrain, 6 Q. L. R. Q. B. 12 (1897).

[5] St. Catharines Milling and Lumber Co. v. R., 14 A. C. 46 (1888).

[6] See The Criminal Code, 55-56 V. c. 29 (1892).

[7] R. v. Boardman, 30 U. C. Q. B. 553 (1871).

3. But a provision of a Provincial (O.) enactment (R. S. O. c. 181, § 57, 1877), providing that on a prosecution for an offence under such Act, any person convicted of tampering with a witness should be liable to a penalty is not within § 92, sub-sections 8 or 15, but infringes on this sub-section and is invalid.[8]

In this latter case it will be observed that the Provincial Legislature attempted to legislate concerning a common law offence, *i.e.*, interfering with a witness (subornation of perjury), which it is submitted affects the "criminal law" within this sub-section according to the definition of Street, J., in R. v. Wason.[9] in R. v. Boardman above referred to[10] the offence was, not compounding a felony, but compounding an offence against a statute, which, in the absence of express legislation, is no offence at all. In this way the two cases are distinguished.

4. An Act creating a new crime for the purpose of punishing it in the interests of public morality deals with criminal law, under this sub-section, while an Act regulating commercial dealings and providing punishments for the protection of parties thereto, does not affect criminal law and is within Provincial jurisdiction.[11]

5. Under a Provincial Act, and to redress a breach of it, the proceeding being civil, there can be no certiorari.[1]

6. Trial with or without a jury is "criminal procedure" within this sub-section and is not an interference with the constitution of the Court (reserved to the Provincial Legislatures, § 92, sub-section 14), and a Dominion statute providing therefor is valid.[2] But the jury when empanelled and sworn are part of the constitution of the Court under § 92, sub-section 14.[3]

7. A Provincial (O.) Act (40 V. c. 18) providing that an offence against a Dominion statute (the Canada Temperance Act of 1864) may be treated as and proceeded upon under the Provincial statute is legislation affecting the criminal law and is *ultra vires* under this sub-section.[4]

[8] R. v. Lawrence, 43 U. C. Q. B. 164 (1878).

[9] 17 O. R. 58 at p. 64 (1890). See *infra*, note 4 under this sub-section.

[10] Note 2 under this sub-section.

[1] *Ex parte* Duncan, 16 C. L. J. 188 (1872); R. v. De Coste, 21 N. S. R. (216), (18 ).

[2] R. v. Bradshaw, 38 U. C. Q. B. 564 (1876).

[3] R. v. O'Rourke, 1 O. R. 464, per Wilson, C.J., in judgment in C. P. D., 32 U. C. C. P. at p. 400 (1882).

[4] R. v. Prittie, 42 U. C. Q. B. 612 (1878); R. v. Lake, 43 U. C. Q. B. 515 (1878).

Since it has been held in the recent case of Attorney-General for Ontario v. Attorney-General for Canada (1896), A. C. 348, that the Canada Temperance Act of 1864 was virtually a Provincial enactment, the reasoi for the decision in the case considered in this note fails, and in all probability the statute here declared *ultra vires* would now be deemed valid legislation.

8. A Provincial (Man.) Act (53 V. c. 51) penalizing the keeping of a gambling house is an infringement of this sub-section and invalid, because the keeping of a gambling house is a common law offence, it being part of the previously existing criminal law, and Provincial Legislatures cannot interfere with common law offences.[5]

9. The Dominion Parliament alone can provide for the summoning of jurors in criminal trials, but may delegate that right to the Provinces, and the exercise by the Province of that right so far as it is not inconsistent with Dominion legislation is not an infringement of this sub-section.[6]

This is a question of *procedure* and not a question relating to the *organization* of Courts.

10. As to delegation referred to in preceding note. The authority to delegate implies the authority to qualify and restrict the power delegated.[7]

11. A Provincial (N.B.) Act (Con. Stat. of 1877, c. 51), declaring that County Courts should not have jurisdiction in actions to recover penalties against justices of the peace where a Dominion statute 32-33 V. c. 31, § 78), (The Summary Convictions Act) had enacted to the contrary is overbourne by such Dominion legislation and is consequently invalid.[8]

12. A Dominion Act (37 V. c. 29) giving an informer a right to recover in a civil action a penalty imposed as a punishment for bribery at an election does not infringe on the rights of the Provincial Legislatures under sub-sections 13 or 14 of § 92, but comes under this sub-section and is valid.[9]

The reason for this is that the rights of an inhabitant of Ontario respecting Dominion elections is one of his political rights in Canada, rather than a civil right in any one Province. (In re North Perth, 21 O. R. 538, per Boyd, C.)

[5] R. v. Wason. See case (reversed in C. A., 17 A. R. 221), as reported in 17 O. R. 58, at p. 64, dissenting judgment of Street, J. (1890).

[6] R. v. Shaw, 7 Man. L. R. 518 (1891).

[6] R. v. O'Rourke, 1 O. R. 464 (1882).

[7] R. v. Plante, 7 Man. L. R. 537 at p. 558, per Dubuc, J., (1891).

[8] Ward v. Reed, N. B. R. 279 (1882).

[9] Doyle v. Bell, 11 A. R. 326 (1884).

13. A Dominion statute (R. S. C. 1886, c. 161), penalizing bigamy no matter where the second marriage takes place, with a provision that nothing in such Act should extend to any second marriage contracted elsewhere than in Canada, by any other than a British subject resident in Canada, and leaving Canada with intent to commit the offence. Held, the question being whether the Imperial Parliament or the Canadian Parliament had power to pass such an Act, that it is within the competence of the Canadian Parliament.[10]

14. But where a second marriage occurred in a foreign country, and there was evidence that the defendant, a British subject resident in Canada, had left there *with intent* to commit the offence, it was held following McLeod v. A.-G. of N. S. W.,[1] that section 275 of the Criminal Code,[2] making such a marriage an offence was *ultra vires* of the Canadian Parliament.[3]

Mr. Clement in his treatise on the law of the Canadian Constitution at pages 191-2 considers R. v. Brierly [4] overruled by McLeod v. A.-G. of N. S. W.[5] The judgment in the Brierly case it seems might have been sustained by taking the view that it is not the actual marriage outside of Canadian territory but the leaving "Canada *with intent* to commit the offence" which the Canadian Parliament has declared a crime. Such intent having existed within Canada, must be within the competence of the Canadian Parliament to penalize. But the Plowman case does not appear to be within the authority of McLeod v. A.-G. of N. S. W., for in the latter case the question of a criminal intent existing within the colony never arose, while it was present but was not considered as vital in R. v. Plowman. And it is submitted, with deference, this is the proper view, and that upon it the conviction in R. v. Plowman, which was quashed by the Queen's Bench Divisional Court (Armour, C.J., and Falconbridge, J.), ought to have been sustained.

15. But the provisions of a Colonial statute penalizing the act of a person, who, being married, goes through the form of marriage with any other person in any part of the world, are invalid as infringing on the exclusive jurisdiction of the Imperial

[10] R. v. Brierly, 14 O. R. 525 (1887).

[1] (1892) A. C. 455.

[2] 55-56 V. c 29 (1892).

[3] R. v. Plowman, 25 O. R. 656 (1894).

[4] 14 O. R. 525 (1887).

[5] (1891) A. C. 455.

[6] R. v. Plowman, 25 O. R. 656 (1894).

Parliament as far as "any part of the world" extends beyond the territorial authority of the legislature which passed the Act in question.[7]

See also the Criminal Code (55-56 V. c. 29), 1892, § 295-a.

16. A Provincial Legislature (O.) cannot regulate procedure, *e.g.*, appeals, in cases of offences against a Dominion enactment.[8]

The statute in question here was the Canada Temperance Act, 1864. Since the case of A.-G. for Ontario v. A.-G. for Canada (1896), A. C. 348, in which this Act was declared in effect a Provincial statute, the decision in the case from which this general statement is taken, is probably not now good law. But this general statement it is submitted is still authoritative.

The point here is that *procedure* connected with the infliction of punishment for offences against Dominion Statutes must be regulated by Dominion legislation.

17. A Provincial (O.) Act (53 V. c. 18, § 2), purporting to empower a police magistrate to try offences under a Dominion Act respecting forgery, does not refer to the Constitution of a Criminal Court (§ 92, sub-section 14), but is legislation respecting procedure in criminal matters within this sub-section, and is *ultra vires* of the Provincial Legislature.[9]

18. A Dominion statute (the Criminal Code)[10] absolving from civil action a person charged with assault and battery, who, if acquitted, obtains a certificate of dismissal of the case, or if convicted, suffers punishment or pays the penalty, is within the power of the Dominion Parliament under this sub-section to enact, and is not within § 92, sub-section 14.[1]

The point here is that the enactment in question is part of the Dominion law coming within the exclusive competence of Dominion legislation, and the Dominion Parliament has exclusive power to impose the consequences of its legislation on a party whom it affects.

19. A Provincial (O.) Act (R. S. O. 1877, c. 42) empowering a County Judge of the County to preside over the sessions in another county is not within sub-sections 14 or 16 of § 92, but is

[7] McLeod v. Attorney-General of New South Wales (1891), A. C. 455.

[8] R. v. Eli, 13 A. R. 526 (1886); R. v. Wason, 17 A. R. 221, at p. 242 (1890), reversing in effect R. v. Roddy, 41 U. C. Q. B. 291 (1877).

[9] R. v. Toland, 22 O. R. 505 (1892).

[10] 55-56 V. c. 29 (1892), §§ 865-6.

[1] Flick v. Brisbin, 26 O. R. 423 (1885).

an infringement on the powers of the Dominion Parliament under this sub-section and is invalid.[2]

SUB-SECTION 28. The Establishment, Maintenance and Management of Penitentiaries.

There are in Canada 5 Penitentiaries,

Kingston Penitentiary,
Dorchester Penitentiary,
Stony Mountain Penitentiary,
British Columbia Penitentiary,
St. Vincent de Paul Penitentiary.

SUB-SECTION 29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

1. The express exceptions in § 92 are those contained in sub-sections 1 and 10.

2. The exception in § 92, sub-section 1, "except as regards the office of Lieutenant-Governor," does not, it is thought, come within the jurisdiction of the Canadian Parliament, it being a matter of Imperial concern.[3]

3. But the exceptions in § 92, sub-section 10, are reserved to the Dominion Parliament.

"And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

1. Where a matter is of a local or private nature (within section 92)[4] it is presumed notwithstanding this clause, not to fall within § 91.[5]

2. See also notes to the introductory clause of this section.

[2] Gibson v. McDonald, 7 O. R. 401 (1885).

[3] Maritime Bank v. Receiver-General of N. B. (1892) A. C. 437.

[4] See § 92, sub-section 16.

[5] L. Union-St. Jacques de Montreal v. Belisle, L. R. 6 P. C. 31 at p. 36 (1874).

SECTION 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to sav:

See § 91, introductory clause, Notes 1 to 14 (inclusive).

1. The rule for determining the extent of the powers of the Provincial Legislatures is enumerated on page 99.

2. For the rules governing the construction of this clause, see the notes to the introductory clause of § 91.

3. The Provincial Legislatures have granted to them the most extensive powers for local purposes under this sub-section.[6]

4. Notwithstanding the endeavour to accord pre-eminence to the Dominion Parliament it cannot have been intended that the powers exclusively assigned to the Provincial Legislatures should be absorbed in those given to the Dominion.[7]

5. The Act can be read so as to avoid all conflict and give each legislative body the full legislative and proprietary rights intended to be conferred by the Imperial Parliament.[8]

6. While legislation respecting Dominion peace and good order (§ 91, introductory clause), is for the Dominion Parliament, that respecting Provincial peace and good order is for the Provincial Legislatures.[9]

7. The B. N. A. Act in conferring jurisdiction over particular subjects must be held to have given at the same time the powers needed for the effective exercise of the jurisdiction granted.[10]

In other words, wherever a Legislature can pass a statute it can always supplement that legislation by sanctions, e. g., penalties and punishments.

8. A Provincial Legislature may legislate with a view to regulating within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons or unwholesome provisions, if such legislation is made *bona fide* with the object of regulation alone, even though, to a certain extent, trade and commerce (§ 91, sub-section 2), are thereby affected.[1]

[6] Richardson v. Ranson, 10 O. R. 387 (1886).

[7] R. v. Robertson, 6 S. C. R. 52 (1882).

[8] R. v. Robertson, 6 S. C. R. 52 (1882).

[9] De St. Aubyn v. Lafrance, 8 Q. L. R. 190 (1882).

[10] *Ex parte* Leveille, 2 Steph. Dig. 445 (1877).

[1] Hodge v. The Queen, 9 A. C. 117 (1883).

9. The Provinces have the most exclusive powers granted to them for local purposes.[2]

SUB-SECTION 1. The amendment from time to time notwithstanding anything in this Act of the Constitution of the Province except as regards the office of Lieutenant-Governor.

1. See § 91, sub-section 29, Notes 1 and 2.

See § 92, sub-section 14, Note 18.

2. A Provincial (O.) Act (51 V. c. 5) empowering the Lieutenant-Governor to remit by Order in Council any penalty imposed through breach of a Provincial law, is not an amendment of the Constitution as regards the office of Lieutenant-Governor, and is valid, the same being legislation intended to affect only offences within the jurisdiction of the Provincial Legislature.[3]

3. Under this sub-section the Provinces of Manitoba and British Columbia have abolished their second chambers (the Executive Councils).

4. This sub-section enables the Provincial Legislatures to deal wth the machinery of government, legislative and executive, within the spheres assigned to them.[4]

5. This sub-section does not empower the Legislatures to enlarge the sphere of legislative authority already granted to the Provinces.

6. An Act (R. S., 5th series, c. 3), empowering a Provincial Legislature (N. S.) to adjudicate that wilful disobedience of its order to attend in reference to a libel reflecting on its members is a breach of privilege and contempt, and providing punishment for a breach thereof by imprisonment, and indemnifying its members against legal proceedings in respect of their votes therein, except so far as they confer criminal jurisdiction other than as incident to the protection of members, are *ultra vires* under this sub-section, or else by virtue of § 5 of the Colonial Laws Validity Act (28-9 V. c. 63) recognized by the B. N. A. Act, § 88. Fielding v. Thomas (1896), A. C. 600.

SUB-SECTION 2. Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

[2] Richardson v. Ransom, 1 O. R. 387 at p. 393 (1885).

[3] Attorney-General for Canada v. Attorney-General of Ontario, 19 A. R. 31 (1892).

[4] Hodge v. R., 9 A. C. 117 at p. 132 (1883).

1. See § 91, introductory clause, Note 16.
See § 91, sub-section 3, Notes 4 and 5.
See § 91, sub-section 5, Note 1.
See § 91, sub-section 12, Note 5.

2. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. To be direct the tax need not be general.[5]

3. A statute of a Provincial (N.B.) Legislature (33 V. c. 47) imposing a local tax for Provincial purposes is direct taxation within this sub-section, but it may also come within sub-sections 9 and 16 of § 92.[6]

4. A statute of a Provincial (Q.) Legislature (39 V. c. 52) conferring on municipalities the right to tax ferrymen and ferries, relates to direct taxation, and is also a local or private matter within sub-section 16, and is valid, the same not infringing on the jurisdiction of the Dominion Parliament respecting navigation and shipping (§ 91, sub-section 10).[7]

5. A Provincial (O.) enactment R. S. O. 1887, c. 194, § 51, sub-section 2), requiring every brewer, maltster and distiller to obtain a license thereunder (and pay a license fee), in order to sell liquor wholesale within the Province is direct taxation within this sub-section, and is valid, it is also valid within the meaning of "other licenses" in sub-section 9 of this section.[8]

6. This sub-section enables a Provincial Legislature whenever it sees fit to impose direct taxation for a local purpose upon a particular locality within the Province, and not merely to raise a revenue for general provincial purposes by a general tax incident on the whole Province.[9]

7. "Regulation" is different from "taxation."[10]

8. A Provincial (Q.) Legislature imposing a direct tax on commercial corporations carrying on business in the Province,

[5] John Stuart Mill's Political Economy; Bank of Toronto v. Lambe, 12 A. C. 575 at p. 582 (1887).

[6] Dow v. Black, L. R. 6 P. C. 272 (1875).

[7] Longueuil v. Montreal, 15 S. C. R. 566 (1888).

[8] R. v. Halliday, 21 A. R. 42 (1893); Brewers and Malsters' Association for Ontario v. Attorney-General for Ontario (1897), A. C. 231; reversing in effect Severn v. R., 2 S. C. R. 76 (1878), which reversed R. v. Taylor, 36 U. C. Q. B. 183 (1875).

[9] Dow v. Black, L. R. 6 P. C. 272 (1875).

[10] Weiler v. Richards, 26 C. L. J., N. S. 338 (1890); Bank of Toronto v. Lambe, 12 A. C. 575 (1887).

relates to direct taxation within this sub-section and is *intra vires* of the Provincial Legislature.[1]

9. Water rates in a city are not taxes.[2]

10. A Provincial Act imposing a tax on the Dominion notes held by a bank as part of its cash reserve under a valid Dominion Act (The Bank Act, 34 V. c. 5, § 18), is direct taxation under this sub-section and is valid.[3]

The principle illustrated by this case is the following: Though property owe its creation to Dominion (or any other) legislation, yet when in a Province, that property is, for purposes of taxation, Provincial property.

11. The Provincial Legislatures have power to raise money by direct taxation, and this excludes the power to raise it by indirect taxation. The power of raising money by direct taxation must however be qualified by the powers given to the Provinces in other sub-sections of § 92 (*e.g.*, by sub-sections 8 and 9), whereby the Provinces can raise money indirectly but incidentally.[4]

12. A Provincial (Man.) Act declaring fees payable by stamps in legal proceedings a direct tax, and enacting that such fees should be bourne by the person actually paying them in the first instance, and none other, is direct taxation within this sub-section, and is *intra vires* of the Provincial Legislature.[5]

This Act surmounted the difficulty raised in Attorney-General of Quebec v. Reed,[6] and other cases following it, where Provincial Stamp Acts were held to be indirect taxation, and consequently *ultra vires* of the Provincial Legislature.

13. The powers of taxation vested in the Provincial Legislatures by this sub-section are not to be curtailed on the ground that they may be abused or prejudicially affect institutions created by Dominion legislation.[8]

14. Regarding the words " within the Province," in the above sub-section, it has been held that the persons to be taxed under a

[1] Pigeon v. Recorders Court, 17 S. C. R. 495 (1890); Bank of Toronto v. Lambe, 12 A. C. 575 (1887).

[2] Attorney-General of Canada v. Toronto, 23 S. C. R. 514 (1893).

[3] Windsor v. Commercial Bank of Windsor, 3 Rus. & Gel. 420 (1882).

[4] R. v. Taylor, 36 U. C. Q. B. 183 at p. 201 (1875).

[5] Crawford v. Duffield, 5 Man. L. R. 121 (1888).

[6] 10 A. C. 141 (1884). See this case at pp. 93 and 102, *supra*.

[7] See preceding note.

[8] Bank of Toronto v. Lambe, 12 A. C. 575 at p. 586 (1887).

Provincial law need not be either domiciled or resident within the Province. Anyone found within the Province may be legally taxed there.[9]

The following proposition founded on the note, and also Note 10 to this §, it is submitted, is likewise true:—

*Anything* found within the Province may be legally taxed there.

15. A Province may under this sub-section impose direct taxation for a local purpose upon a particular locality within the Province.[10]

SUB-SECTION 3. The borrowing of money on the sole credit of the Province.

SUB-SECTION 4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers.

See § 92, sub-section 14, Note 18.

See § 92, sub-section 18, Note 13.

1. A Provincial Legislature may provide for the appointment of officers to enforce the Canadian Temperance Acts of 1864 (passed prior to the Union)[1] by the Province of Canada, and of 1878 (passed after the Union by the Dominion of Canada),[2] in municipalities where either of these statutes had been adopted, such legislation being within the jurisdiction of the Province under this sub-section, also under § 92, sub-sections 8 and 16.

Mr. Clement questions these decisions.[3] In view of the decision of the Imperial Privy Council in Attorney-General for Ontario v. Attorney-General for Canada (1896) A. C. 348, considered under Note 23 to the introductory clause of § 91 of the B. N. A. Act, it is submitted that the former of these two cases is certainly a valid authority, and very probably the latter is valid as well.

SUB-SECTION 5. The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon.

See § 91, sub-section 3, Note 4.

[9] *Ibid* at p. 584.

[10] Dulmage v. Douglas, 4 Man. L. R. 495 (1887).

[1] License Commissioners of Prince Edward v. Prince Edward, 26 Gr. 452 (1879).

[2] License Commissioners of Frontenac v. County of Frontenac, 14 O. R. 749 (1887).

[3] Clement on the Law of the Canadian Constitution (1892), 436-7.

SUB-SECTION 6. The establishment and maintenance of the Public and Reformatory Prisons in and for the Province.

SUB-SECTION 7. The establishment, maintenance and management of Hospitals, Asylums, Charities and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

See § 91, introductory clause, Note 24.

SUB-SECTION 8. Municipal Institutions in the Province.

Great difficulty has been experienced in distinguishing legislation coming under this and the following sub-section, from legislation respecting the regulation of trade and commerce (§ 91, sub-section 2), and the distinction in some instances seems to be arbitrary.

1. See § 91, introductory clause, Note 19.
   See § 91, sub-section 19, Notes 1 and 3.
   See § 91, sub-section 27, Note 3.
   See § 92, sub-section 2, Note 11.
   See § 92, sub-section 4, Note 4.
   See § 92, sub-section 18, Note 10.
   See § 92, sub-section 15, Note 4.

2. A Provincial (O.) Act (32 V. c. 32) empowering municipal corporations to pass by-laws wholly prohibiting the sale of liquors in all places except houses of public entertainment, and limiting the number of licenses, is legislation within this sub-section and sub-section 16 of § 92, and not being legislation respecting the regulation of trade and commerce (§ 91, sub-section 2), is valid.[4]

3. By this sub-section the Imperial Parliament must have intended the Provinces to establish municipalities possessing the same powers as those existing at the time of the Union.[5]

4. The Provinces may make reasonable regulations for preserving good order in the municipalities under their control, and for this purpose may restrict the sale of spirituous liquors. And a Provincial (Q.) statute (38 V. c. 74, § 4), ordering houses, in which spirituous liquors are sold, to be closed at certain times, is within the powers of the Provinces to enact, and comes within this sub-section.[6]

[4] Slavin v. Orillia, 36 U. C. Q. B. 159 (1875).

[5] *Ibid*; Corporation of Three Rivers v. Suite, 5 Q. L. N. 330 (1885); Noel v. Richmond, 1 Dor. Q. A. 333 (1881).

[6] Blouin v. Quebec, 7 Q. L. R. 18.

See Note 23 to introductory clause of § 91.

5. A Provincial (R. S. O. 1877, c. 181), statute imposing hard labor as a punishment for the violation of any of its laws, is valid under this sub-section and sub-section 9 of this section.[7]

The reason for this is that any legislature can carry out its laws by penalties and punishments, otherwise the laws would be ineffective in their operation in cases where they were violated.

6. This sub-section and sub-section 9 of this section are cumulative.[8]

7. A Provincial (Q.) Act (42-43 V. c. 4) prohibiting or regulating the sale of liquors in saloons or taverns is within the power of the Provincial Legislatures under this sub-section.[9]

See Note 23 to introductory clause of § 91.

8. A Provincial (Q.) Act (57 V. c. 51, and 42-43 V. c. 53), respecting the abolition of nuisances as being hurtful to public health is within the competence of the Provincial Legislatures, even though the Dominion Parliament may enact a general law regarding nuisances under § 91, sub-section 27.[10]

This is under the above clause and also sub-section 16 of this §.

9. *Quære*,[1] per Cameron, J., as to the power of the Local Legislatures to limit or authorize municipalities to limit the number of licenses.[2]

See, now, next note.

10. The sections of a Provincial (O.) Act (R. S. O. 1877, c. 181), which make regulations in the nature of police, or which make municipal regulations of a merely local character for the good government of taverns, etc., do not interfere with the general regulation which the Dominion government exercises over trade and commerce (§ 91, sub-section 2), but come within § 92, sub-sections 8, 15 and 16, and are *intra vires* of the Provincial Legislatures.[3]

11. A Provincial (O.) statute (51 V. c. 2) designating the judicial officer by whom controverted municipal election petitions are to be determined is within the power of the Provincial Legislature under this sub-section.[4]

[7] R. v. Frawley, 7 A. R. 246 (1882).
[8] *Ibid.*
[9] Poulin v. Quebec, 9 S. C. R. 185 (1881).
[10] *Ex parte* Pillow, 27 L. C. Jur. 216 (1883).
[1] This doubt is now settled, see note following.
[2] R. v. Howard, 46 U. C. Q. B. 346 (1881).
[3] Hodge v. R., 9 A. C. 117 (1883).
[4] Reg ex rel McGuire v. Birkett, 21 O. R. 162 (1891).

12. A statute of a Provincial (Q.) Legislature in the nature of an absolute or conditional prohibitory liquor law applicable to all municipalities within the Province relates to municipal institutions within this sub-section.[5]

See next note.

And a Provincial (O.) enactment (53 V. c. 56, § 18), empowering municipal bodies upon certain conditions to pass prohibitory liquor by-laws, so long as the prohibition extends only to the retail sale of liquors, is *intra vires* of the Provincial Legislature.[6]

13. Provincial (O.) laws (R. S. O. 1877, c. 181; 41 V. c. 14, 44 V. c. 27, 47 V. c. 34, providing for the enforcement by Provincial officers (appointed and paid according to Provincial legislation) of a Dominion statute (The Canada Temperance Act of 1878), which has been properly brought into force in any municipality are within the competence of the Provincial Legislature by this sub-section, and by sub-sections 4 and 16 of § 92.[7]

See note 1 to sub-section 4 of this §.

14. A Provincial (Q.) absolute or conditional prohibitory liquor law (38 V. c. 76) for the purpose of municipal institutions is not incompatible with the power of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion.[8]

Such Act may be valid within the next sub-section. See § 92, sub-section 9, Note 7.

15. A Provincial (O.) Act (R. S. O. c. 174, § 466, sub-section 6), empowering City Councils to pass by-laws "for preventing criers and vendors of small wares from practising their calling in the market, public streets and vacant lots adjacent thereto," is within the power of the Province within this sub-section, and is not an interference with trade and commerce (§ 91, sub-section 2).[9]

16. The control over navigation conferred on the Dominion Parliament (§ 91, sub-section 10), does not prevent the Provinces from exercising municipal and police control on navigable rivers, and a Provincial (Q.) Act (43-44 V. c. 62) extending the limit of

[5] Corporation of Three Rivers v. Sulte, 5 Q. L. N. 330 (1885).

[6] Huson v. Township of South Norwich, 24 S. C. R. 145 (1895); In re Local Option Act, 18 A. R. 572 (1891); Attorney-General for Ontario v. Attorney-General for Canada, 1896, A. C. 348.

[7] License Commissioners of Frontenac v. Frontenac, 14 O. R. 741 (1887).

[8] Corporation of Three Rivers v. Sulte, 5 Q. L. N. 330 (1882); 11 S. C. R. 25 (1883).

[9] Harris v. Hamilton, 44 U. C. Q. B. 641 (1879).

the Town of St. Johns to the middle of a navigable river was held valid, and to confer the right to tax property within the added limits.[10]

SUB-SECTION 9. Shop, saloon, tavern and auctioneer, and other licenses, in order to the raising of a revenue for Provincial, Local or Municipal purposes.

See § 91, introductory clause, Note 18.
See § 91, sub-section 2, Note 14.
See § 91, sub-section 27, Note 2.
See § 91, sub-section 29, Note 1.
See § 92, sub-section 2, Notes 3, 5 and 11.
See § 92, sub-section 8, Notes 5, 6 and 14.

1. The scope of this clause is determined by its expressed purpose, "the raising of a revenue."

2. It is by virtue of this sub-section alone that the Provincial Legislature can claim the right to pass laws affecting or restraining commerce.[1]

3. A law of a Provincial (Q.) Legislature (The Quebec License Law of 1878) relating to the sale of liquors in taverns and public places, so as the better to maintain peace and good order comes within this sub-section and is valid.[2]

4. The expression *license* has not a limited application in our statutes, and wholesale traders have been obliged to take out licenses for municipal revenue.[3]

5. A Provincial (N.S.) Act (R. S., 4th series, c. 75), passed after Confederation imposing penalties for retailing liquors without a license, and providing for the granting of licenses, similar enactments having been in force in the Province prior to Confederation is within the power of the Province under this sub-section, and is not legislation respecting trade and commerce, under § 91, sub-section 2.[4]

6. The power to license inland ferries in a Province rests with the Province.[5]

7. A Provincial (Q.) Act (38 V. c. 76) repealing an Act of the old Province of Canada, which incorporated the City of Three

[10] The Central Vermont Ry. v. St. Johns, 14 S. C. R. 288 (1887). affirmed in Privy Council 14 A. C. 590 (1888).

[1] De St. Aubyn v. Lafrance, 8 Q. L. R. 190, at p. 191 (1882).

[2] *Ibid.*

[3] See 1 Cart. 429, and authorities there noted.

[4] Keefe v. McLennan, 2 Russ. & Chel. 5 (1876).

[5] Longueuil v. Montreal, Mont. L. R. 3 Q. B. 172 at p. 183 (1888).

Rivers, and conferred on its Council authority to pass by-laws restraining and prohibiting the sale of intoxicating liquors or providing for their sale upon conditions, is within the powers of the Province under this sub-section, the same being intended to permit of the raising of a revenue for municipal purposes.[6]

8. A Provincial (Q.) Act (37 V. c. 81) authorizing a municipal corporation to impose a license tax on butchers who keep stalls elsewhere than on the public markets is within the authority of the Provincial Legislature as given by this sub-section, and is not an interference with trade and commerce.[7]

9. A Provincial Act imposing fines and penalties for selling liquor without a license is valid within this sub-section and also sub-section 15 of this section.[8]

The reason for this is that a Legislature's enactments can be carried out by proper sanctions, otherwise they will be mere directions.

10. A Dominion statute (45 V. c. 118) empowering corporations to hold lands in Canada does not prevent a Province from passing a law preventing entirely or restricting the holding of lands by corporations in a Province, the Dominion statute merely operating as a license from the Crown.[9]

11. A Provincial (Q.) statute (41 V. c. 3), providing for the granting of a license to liquor merchants is *intra vires* of the Province within this sub-section, but does not prevent the Dominion Parliament providing (43 V. c. 19) for the granting of a license for the manufacture of liquor to brewers, with a restriction therein from selling same elsewhere than on their own premises.[10]

12. A Dominion Government license to a brewer to manufacture beer, it is submitted, restricts the licensee from selling the same elsewhere than on his own premises.[1]

13. A Provincial (N.B.) Act (50 V. c. 4) imposing on the holder of a liquor license burdens which are not necessarily an absolute prohibition of the liquor traffic is *intra vires* within this sub-section.[2]

[6] Sulte v. Corporation of Three Rivers, 11 S. C. R. 25 (1883). See note 13 to preceding section.

[7] Angers v. Montreal, 24 L. C. J. 259 (1876); Mallette v. Montreal, 24 L. C. J. 263 (1879).

[8] R. v. McMillan, 2 Pugs. 110 (1874).

[9] McDiarmid v. Hughes, 16 O. R. 570 (1888).

[10] Molson v. Lambe, 15 S. C. R. 253 (1888).

[1] *Ibid.*

[2] Danaher v. Peters, 17 S. C. R. 44 (1889).

14. A Provincial (Q.) Act (The Quebec License Act) imposing penalties for the violation of Provincial laws under this sub-section does not infringe on the right of the Dominion Parliament to legislate respecting trade and commerce (§ 91, sub-section 2), and the Provincial Legislature having jurisdiction over such subjects has also power for the effective exercise of that jurisdiction.[3]

15. Provincial enactments whereby persons who sell liquor by wholesale are required to take out a license are not invalid as an interference with trade and commerce (§ 91, sub-section 2).[4]

16. In the absence of conflicting legislation by the Canadian Parliament, the Provincial Legislatures have power to prohibit the sale of liquor if such prohibition be only local in the Provinces.[5]

SUB-SECTION 10. Local Works and Undertakings other than such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings, connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province:

(*b*) Lines of steamships between the Province and any British or foreign country:

(*c*) Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces.

1. See § 91, sub-sections 3, Note 4.
See § 91, sub-section 10, Note 1.
See § 91, sub-section 29, Notes 1, and 3.
See § 92, sub-section 13, Notes 12 and 18.

2. A Dominion Act (38 V. c. 20) requiring Insurance Companies to obtain licenses from the Minister of Finance as a condition precedent to their carrying on the business of Insurance in the Dominion cannot withdraw the company from the operation

[3] *Ex parte* Leveille, 2 Steph. Dig. 445 (1877).

[4] *Ibid.*

[5] Attorney-General for Ontario v. Attorney-General for the Dominion of Canada (1896) A. C. 348.

of a Provincial Act (39 V. c. 34) to secure uniform conditions in insurance policies.[6]

3. A Provincial (Q.) Act (31 V. c. 25) incorporating a navigation company, the operations of which are confined to a particular province, does not invade the jurisdiction of the Dominion Parliament respecting navigation and shipping, but is within the power of a Provincial Legislature under the sub-section.[7]

4. A Provincial (O.) Act (44 V. c. 22) declaring that one of its provisions (as to frog packing on a railway) shall apply only to those railways over which the Ontario Legislature has jurisdiction, derives its validity from this sub-section and therefore does not apply to a railway between two Provinces, which by clause "A" of this sub-section is excepted from the operation of a Provincial Act.[8]

5. A Provincial (Q.) enactment (39 V. c. 2, § 8) amalgamating a railway company which having been incorporated by a Provincial (Q.) Act (32 V. c. 55) was declared by a Dominion Act (36 V. c. 82) to be a federal railway (see clause "C" of this sub-section) with a Provincial railway, is legislation respecting a federal company, and an invasion of the Dominion rights, under clause "C" of this sub-section, and is therefore invalid.[9]

6. A Dominion statute (51 V. c. 5) enacting that no Provincial railway shall cross a Dominion railway without the approval of the Railway Committee of the Privy Council (a body created by Dominion legislation) is within the power of the Dominion Parliament under exception "C" to this sub-section, and is valid.[10]

7. The provisions in a Provincial (Q.) Act (38 V. c. 64) substituting a new class of persons interested in the trust funds of a Board of Management for the old class, after the Board had, by Dominion legislation (22 V. c. 66) become a federal organization, infringes on rights of the Dominion Parliament under the exception in clause "C" of this sub-section and are invalid.[1]

8. Where a Provincial and Dominion railway cross, both the Provincial Commissioner of Public Works, and the Dominion Railway Committee of the Privy Council must give their consent, which the railway companies cannot by consent waive.[2]

[6] Citizens v. Parsons; Queen v. Parsons, 4 A. C. 96 (1881).

[7] Macdougall v. Union Navigation Co'y, 21 L. C. J. 62 (1877).

[8] Monkhouse v. G. T. R., 8 A. R. 637 (1883).

[9] Bourgoin v. M. O. and O. Ry. Co., 5 A. C. 381 (1880).

[10] C. P. R. v. Northern Pacific and Man. Ry. Co., 5 Man. L. R. 301 (1888).

[1] Dobie v. The Temporalities Board, 7 A. C. 136 (1882).

[2] Credit Valley Ry. Co. v. G. W. R. Co., 25 Gr. 507 (1878).

9. A Provincial (O.) Act (31 V. c. 44) converting bonds and old stock of a railway company (the Brockville and Ottawa Railway Co.), which the Province had (by 23 V. c. 109) authorized, into reduced new stock is valid legislation within this section, notwithstanding the fact that such debts are by fiction of law domiciled out of the Province.[3]

10. Whether the Toronto Harbour belongs to the Dominion or to the Province of Ontario its Commissioners must be subject to the law of Ontario where their trust is to be administered.[4]

11. The Dominion Parliament has the exclusive right to prescribe regulations for the construction, repair and alteration of the appellant railway, and the Provincial Legislature has no power to regulate the structure of a ditch forming part of its authorized works. But the provisions of the Municipal Code of Quebec having prescribed the cleaning of the ditch and the removal of an obstruction which had caused inundation of neighboring land, are *intra vires* of the Provincial Legislature, as a railway, the company is under the control of the Dominion Parliament, but in all other respects it is subject to Provincial control, it being property within the Province. C. P. R. Co. v. Corporation of the Parish of Notre Dame de Bonsecours, 1899 (A. C.) 367.

## SUB-SECTION 11. The Incorporation of Companies with Provincial objects.

1. See § 91, introductory clause, Note 24.

2. A Dominion statute (37 V. c. 103) creating a corporation to carry on business in the Dominion, is not an interference with this sub-section, though the company confine its operations to one Province only, and is valid.[5]

3. The following is a summary of the decisions respecting jurisdiction:

(*a*) A company chartered to operate in one Province, and operating there, is a Provincial company.[6]

[3] Jones v. Canada Central Ry. Co., 46 U. C. Q. B. 250 (1881).

[4] Re The Toronto Harbour Commissioners, 28 Gr. 195 (1881); In re the Commissioners of the Cobourg Town Trust, 22 Gr. 377 (1875).

[5] Col. Bldg. and Inv. Ass'n v. A.-G. of Quebec (Loranger), 9 A. C. 157 (1883), reversing Loranger v. Col. Bldg. & Inv. Ass'n, 5 Q. L. N. 116 (1882); and reversing in effect R. v. Mohr, 7 Q. L. R. 183 (1881).

[6] Macdougall v. Union Navigation Co., 21 L. C. J. 63 (1877).

(b) A company chartered to operate in several Provinces, and operating in only one, is a Dominion company.[7]

4. "Provincial objects" refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality.[8]

5. A Provincial (O.) Act (39 V. c. 93) incorporating an insurance company, is within this sub-section, and such company may enter into contracts outside the Province of incorporation wherever such contracts are recognized by comity or otherwise.[9]

6. Such a company's contracts, entered into outside the Province of incorporation, have only whatever force the authority in such place (outside the Province of incorporation) chooses by courtesy or otherwise to accord them.[10]

7. Canadian statutes (20 V. c. 227, and 32-33 V. c. 65), rendering Canadians and Canadian corporations subject to any United States laws is unconstitutional in the sense in which any Imperial enactment is unconstitutional, it being here an abdication of sovereignty, and this sub-section cannot give it validity.[1]

7. A Provincial (N. B.) Act (32 V. c. 54) legislating respecting a Provincial railway running only to the boundaries of the Province, is within the power of the Province under this sub-section, even though there be corresponding legislation by the authority beyond the Province providing for connection with it.[2]

## SUB-SECTION 12. Solemnization of Marriage in the Province.

1. See notes to § 91, sub-section 26.

2. The Provincial Legislatures have control of all legislation, including procedure, respecting the formation of the marriage tie, the Dominion Parliament has control of all legislation, including the procedure, respecting the sundering of that tie.

## SUB-SECTION 13. Property and Civil Rights in the Province.

1. See § 91, introductory clause, Notes 18, 20, 24 and 25.
See § 91, sub-section 2, Notes 8 and 10.
See § 91, sub-section 8, Note 5.
See § 91, sub-section 15, Notes 6 and 8.

[7] Col. Bldg. & Inv. Ass'n. v. A.-G. of Quebec (*supra*).

[8] Clarke v. Union Fire Insurance Co.'y, 10 P. R. 313 (1883).

[9] *Ibid.*

[10] *Ibid.*

[1] International Bridge Co. v. C. S. Ry. Co.'y, 28 Gr. 114 (1881).

[2] European & N. A. Railway Co. v. Thomas, 1 Pugs. 42 (1871).

See § 91, sub-section 21, Notes 1, 4, 6, 11 and 12.
See § 91, sub-section 22, Note 3.
See § 91, sub-section 27. Note 12.

2. These words are sufficiently large to embrace such rights arising from contract as are not included in the classes of subjects set out in § 91.[3] These words are used in their largest sense.[4] They do not exclude all jurisdiction in the Dominion Parliament.[5] Too much importance has been attached to this sub-section (also to section 92, sub-section 14, and to § 101).[6]

3. A Provincial (O.) Act (34 V. c. 99) altering a testator's will and re-dividing his property is within the powers of a Provincial Legislature under this sub-section.[7]

4. A Provincial (N.B.) Act (C. S. N. B. c. 38), providing for the imprisonment of a person making default in payment of a sum due on a judgment, where he has since the judgment had means to pay and defaulted, or where the liability in question was incurred through fraud, by which the debtor might have been proceeded against criminally, is not insolvent legislation (§ 91, sub-section 21), but is within the powers of the Provincial Legislature under this sub-section and also sub-sections 14 and 15 of § 92, and is valid.[8]

5. The enforcing of the payment of such a judgment is a civil right within this sub-section.[9]

6. A Provincial (O.) Act (39 V. c. 24), to secure uniform conditions in fire insurance policies is within the power of the Provincial Legislatures to enact within this sub-section, the same not being legislation respecting trade and commerce (§ 91, sub-section 2).[10]

7. The provision in a Provincial (Q.) Act (32 V. c. 15, § 190), authorizing the Lieutenant-Governor (*a*) to revoke the right in certain municipalities to exact tolls in case of default in making repairs, and (*b*) to transfer the property to others, is within the powers of the Province under this sub-section and also § 92, sub-section 16.[1]

[3] Citizens v. Parsons, 7 A. C. 96 (1881).

[4] *Ibid.*

[5] Valin v. Langlois, 3 S. C. R. 1, per Fournier, J. (judgment affirmed in the Privy Council), 5 A. C. 115 (1879).

[6] *Ibid*, per Ritchie, C.J., in Supreme Court.

[7] Re Goodhue, 19 Gr. 366 (1872).

[8] *Ex parte* Ellis, 1 P. & B. 593 (1878).

[9] *Ibid*, judgment of Allen, C.J.

[10] Citizens v. Parsons, 7 A. C. 96 (1881).

[1] Cleveland v. Melbourne, 4 Q. L. N. 277 (1881).

8. A Provincial (N.S.) Act (41 V. c. 8) authorizing a Provincial Governor in Council to appoint Commissioners with authority to entertain an application for the discharge of insolvent debtors under a Provincial Act (R. S., 3rd series, c. 137), passed before Confederation, is not insolvency legislation (§ 91, sub-section 21), but relates to either property and civil rights in the Province, or the matters referred to in § 92, sub-section 14, and is valid.[2]

9. To discharge a person unable to pay a particular debt is not to deal with the general subject of insolvency (§ 91, sub-section 21), but relates to the matters in this sub-section.[3]

10. A Provincial (O.) Act (39 V. c. 62) varying the trusts in a grant of ordinance lands made to a municipal corporation (the Corporation of the City of Toronto) by the old Province of Canada is within the powers of the Provincial Legislature under this sub-section.[4]

11. The clauses in a Provincial (Q.) Act (38 V. c. 64) materially altering the class of persons interested in the corporate funds of a Board of Management after the Board has by Dominion Legislation (22 V. c. 66) become a federal organization is not legislation respecting property and civil rights in the Province, but infringes on the jurisdiction of the Dominion Parliament and is invalid.[5]

12. A Provincial (O.) Act (R. S. O. 1887, c. 141, the Workmen's Compensation for Injuries Act), giving workmen on Dominion railways, who are injured in the course of their employment, the right under certain circumstances to recover compensation from their employers for such injuries, is legislation affecting civil rights in the Province and is valid. It is not legislation within § 92, sub-section 10, exceptions a, b and c.[6]

13. A Provincial (O.) Act (48 V. c. 26)—(There being no Dominion statute on bankruptcy and insolvency), for the purpose of enabling insolvent debtors to place their creditors on an equal footing, but not relieving the debtor from arrest or interfering with his after acquired property is legislation respecting property and civil rights in a Province and does not infringe on § 91, sub-section 21, and is valid.[7]

[2] Johnston v. Poyntz, 2 R. & G. 193 (1881).

[3] *Ibid*—arguendo.

[4] Kennedy v. Toronto, 12 O. R. 211 (1886).

[5] Dobie v. The Temporalities Board, 7 A. C. 136 (1882). See introductory clause, Note 24.

[6] C. S. R. v. Jackson, 17 S. C. R. 316 (1890).

[7] Clarkson v. Ontario Bank, Edgar v. Central Bank of Canada, 15 A. R. 166 (1888).

14. Such legislation must not conflict with Dominion bankruptcy legislation (§ 91, sub-section 21).[8]

15. A Provincial (N.S.) Act (37 V. c. 104) for facilitating arrangements between railway companies and their creditors whereby six per cent. stock was replaced by stock bearing a lower rate of interest, and different in other particulars, is within the power of the Province under this sub-section and is not insolvency legislation (§ 91, sub-section 21), and is valid so far as is necessary to confirm such scheme.[9]

16. A Provincial (Q.) Act (The Pharmacy Act of 1875) fixing the age or other qualifications required on the part of persons resident in the Province to entitle them to manage their own affairs, or exercise certain professions, or branches of business, attended with public danger or risk, though incidentally affecting trade and commerce (§ 91, sub-section 2), is valid within this sub-section; and the Provincial Legislature may appropriate fines to municipal or other corporations.[10]

17. A Provincial (N.B.) enactment (Con. Stat. of N. B. c. 75, § 1), providing that, as against the grantor's assignee, under any insolvency law, a bill of sale should take effect only from time of filing, relates to property and civil rights, and is valid.[1]

18. A Dominion Act (R. S. C. 1886, c. 109), limits to six months the time for bringing actions against railway companies over which Parliament has jurisdiction, for injuries caused by the railway does not interfere with this sub-section, but is legislation within § 92, sub-section 10 (clause or exception C.), and is valid.[2]

SUB-SECTION 14. The Administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts.

[8] Attorney-General of Ontario v. Attorney-General for the Dominion of Canada (1894), A. C. 189, reversing In Re Assignments and Preferences Act, 20 A. R. 289 (1895), and overruling Union Bank v. Neville, 21 O. R. 152.

[9] Re Windsor & Annapolis Ry., 4 R. & G. 312 (1888).

[10] Bennett v. Pharmaceutical Association of Quebec, 1 Dor. Q. A. 336 (1881).

[1] In re De Veber, 21 N. B. R. 401 (1882).

[2] C. S. R. Co. v. Jackson, 17 S. C. R. 316 at p. 325 (1890).

[3] McArthur v. The Northern and Pacific Junction Ry. Co., *et al.*, 17 A. R. 86 (1889).

1. See § 91, introductory clause, Notes 17 and 20.
See § 91, sub-section 21, Notes 1, 5 and 12.
See § 91, sub-section 27, Notes 6, 12, 17, 18 and 19.
See § 92, sub-section 13, Notes 2, 4 and 8.

2. A Provincial (Q.) Act (34 V. c. 2, § 4), regulating procedure affecting penal laws, which such Legislature has authority to enact, is legislation within this sub-section, and does not infringe on the rights of the Dominion Parliament under § 91, sub-section 27.[4]

3. A Provincial (Q.) Act (41 V. c. 3) prescribing the mode for the enforcing of penalties which it imposes for a breach of its provisions is valid under this sub-section.[5]

4. A Provincial (Q.) Act (34 V. c. 2) abolishing certiorari in civil proceedings before a district magistrate for the enforcing of penalties under the license law of the Province, is a civil matter, and the right to certiorari is taken away.[6]

5. A Provincial (N.B.) Act (The Act respecting Courts of Criminal Jurisdiction over all Crimes which are not Capital), relating to the attendance of grand and petit jurors at these Courts is within the power of the Province under this sub-section, and is not legislation respecting criminal law under § 91, sub-section 27, and is valid.[7]

6. A Provincial (Q.) enactment (31 V. c. 32, and 32 V. c. 29), appointing Fire Commissioners or Marshals, with power to investigate the origin of fires occurring in certain places, within the Province (Quebec and Montreal), and to compel the attendance of witnesses and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause, is not legislation affecting the criminal law under § 91, sub-section 27, but comes within this sub-section and is valid.[8]

7. *Quære*, if a Dominion Act (32-3 V. c. 29, § 13), relating to costs in actions against justices of the peace is not *ultra vires* of the Dominion Parliament as relating to procedure in a civil matter within this sub-section.[9]

[4] Pope v. Griffith, 16 L. C. J. 169 (1872); *Ex parte* Duncan, 16 L. C. J. 188 (1872); Paige v. Griffith, 17 L. C. J. 302 (1873); Cote v. Chauveau, 7 Q. L. R. 258 (1880).

[5] Cote v. Chauvean, 7 Q. L. R. 258 (1880).

[6] *Ex parte* Duncan, 16 L. C. J. 188 (1872).

[7] R. v. Foley, Steph. N. B. Dig. 381 (1873).

[8] R. v. Coote, L. R. 4 P. C. 599 (1873); Hodge v. R., 9 A. C. 117 (1883); reversing in effect Tarte v. Beique, 6 Mont. L. R. 289 (1890).

[9] Whittier v. Diblee, 2 Pugs. 243 (1874).

8. The enforcing of the payment of a judgment is a civil right, and the mode of enforcing it is part of the administration of justice and procedure in civil matters in the Province, and are within the jurisdiction of the Provincial Legislature.[10]

9. A Provincial (O.) enactment (41 V. c. 4, and 48 V. c. 17) empowering the Lieutenant-Governor of the Province to appoint justices of the peace and police magistrates is part of the system of the administration of justice in the Province, and is *intra vires*.[1]

10. *Quære* if § 51 of the Dominion Supreme and Exchequer Courts Act (38 V. c. 11) which confers power on the Supreme Court Judges to issue writs of habeas corpus is not *ultra vires* of the Dominion Parliament as being *ultra vires* of this sub-section.[2]

11. The words of this sub-section are limited by §§ 96 and 101 of the B. N. A. Act.[3]

12. Sub-section 27 of § 91 does not prevent a Province (O.) from regulating trials of offences against its own laws (though such offences may be termed crimes), and the giving of evidence in such cases, and R. S. O. (1887) c. 61, § 9, providing that where the offence is a crime under a Provincial statute, the defendant is not a competent nor compellable witness, does not invade the exclusive jurisdiction of the Dominion Parliament under sub-section 27 of section 91, and is valid.[4]

13. A Provincial (O.) law (53 V. c. 18) empowering a Court (the General Sessions of the Peace) to try any offence under the provisions of a Dominion statute, is not an invasion of § 91, sub-section 27, but is within the jurisdiction of the Provincial Legislature under this sub-section and is valid[5]

Note.—In other words any government may take advantage of the existence of any person or body within its limits and impose on it the same duties it might impose on its own particular officers,[6] even though the duties refer to matters entirely without the competence of the body so imposed upon, apart from such express conference of powers.[7]

[10] *Ex parte* Ellis, 1 P. & B. 593, judgment of Allen, C.J. (1878).

[1] R. v. Bennett, 1 O. R. 445 (1882); R. v. Bush, 15 O. R. 398 (1888).

[2] In re Sproule, 12 S. C. R. 140 (1886).

[3] R. v. Bush, 15 O. R. 398, at p. 404 (1888).

[4] R. v. Bittle, 21 O. R. 605 (1892).

[5] R. v. Levinger, 22 O. R. 690 (1892).

[6] A.-G. v. Flint, 16 S. C. R. 707 (1884); The Farewell, 7 Q. L. R. 380 (1881); R. v. Bennett, 1 O. R. 445 (1882); R. v. Bush, 15 O. R. 398 (1888); R. v. Richardson, 8 O. R. 651 (1883); Richardson v. Ransom, 10 O. R. 387 (1885).

[7] Valin v. Langlois, 5 A. C. 115 (1879).

14. A Dominion statute (46 V. c. 17) providing for the receiving in evidence of certified copies of documents and records in the Dominion lands office, is invalid as far as it affects proceedings in civil matters, which by this sub-section are within the jurisdiction of the Province.[8]

15. The B. N. A. Act in giving the Provinces (B.C.) jurisdiction under this sub-section, confers on them the exclusive right to define the jurisdiction of the Courts territorially as well as in other respects (Con. St. B. C. c. 25, § 14), and also to define the jurisdiction of the Judges of such Courts.[9]

16. The Province can regulate the appointment of police Magistrates,[10] and Justices of the Peace.[1] See Note 9 to this subsection.

17. Where an obstacle is not a public nuisance, the Provincial Attorney-General is not the proper person to file an information with a view to its abatement.[2]

18. A Provincial (O.) Act (R. S. O. 1877, c. 139) empowering the Lieutenant-Governor of the Province to confer precedence by patents upon such members of the Provincial bar as he may think fit to select is by § 92, sub-sections 1, 4 and 14, within the powers of the Provincial Legislatures to enact.[3]

The law on this question is as follows: The Federal Parliament has power to provide for the conferring of precedence on members of the Bar in Federal Courts; the Provincial Legislatures have power to provide for the conferring of precedence on members of the Bar in Provincial Courts.

19. In Criminal cases no appeal to the Privy Council will be allowed, except where some clear departure from the requirements of Justice is alleged to have taken place.[4]

In Criminal cases no appeal to the Privy Council now lies at all, the same having been abolished in 1892.[5]

[8] McKilligan v. Machar, 3 Man. L. R. 418 (1886).

[9] Re County Courts of British Columbia, 21 S. C. R. 446 (1892).

[10] Richardson v. Ransom, 10 O. R. 387 (1885).

[1] R. v. Bush, 15 O. R. 398 (1888). See Note 3 to § 96.

[2] Attorney-General for Ontario v. The International Bridge Co., 6 A. R. 537 (1881).

[3] Attorney-General for the Dominion of Canada v. Attorney-General for the Province of Ontario, 1897, A.C. 247, affirming 23 A.R. 792, reversing in effect Lenoir v. Ritchie, 3 S. C. R. 575 (1879).

[4] Riel v. R., 10 A. C. 675 (1885).

[5] The Criminal Code, 55-6 V. c. 29, § 751 (1892).

20. The Dominion Parliament may (by 31 V. c. 8, § 156), confer additional jurisdiction on the Halifax Vice-Admiralty Court, although that Court was an Imperial creation.[c] See sub-note to Note 3, above.

SUB-SECTION 15. The imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

1. See § 91, introductory clause, Note 18.
See § 91, sub-section 27, Notes 2 and 3.
See § 92, sub-section 3, Note 4.
See § 92, sub-section 8, Note 10.

2. Procedure hereunder is a civil proceeding.[7]

3. The words "Fine, penalty or imprisonment," means "Fine, penalty and imprisonment."[8]

4. A Provincial (O.) Act (R. S. O. 1877, c. 181), making police regulations for the good government of taverns, such regulations being merely of a local character, is within this sub-section, also sub-sections 8 and 16 of this Section, and is valid.[9]

5. "Imprisonment includes with or without hard labour.[10]

6. A Provincial (O.) Act (52 V. c. 15) respecting appeals on prosecutions to enforce penalties and punish offences under Provincial Acts does not affect the Criminal law (§ 91, sub-section 27), but is legislation within this sub-section and is valid.[1]

SUB-SECTION 16. Generally all matters of a merely local or private nature in the Province.

1. See § 91, introductory clause, Notes 1, 8, 19 and 20.
See § 91, sub-section 27, Notes 2 and 19.
See § 91, closing clause, Note 1.
See § 92, sub-section 2, Notes 3 and 4.
See § 92, sub-section 4, Note 1.
See § 92, sub-section 8, Notes 2, 10 and 13.
See § 92, sub-section 13, Notes 4 and 7.

[6] Attorney-General of Canada v. Flint, 16 S. C. R. 707 (1884).

[7] R. v. Bittle, 21 O. R. 605 (1892).

[8] Hodge v. R., 9 A. C. 117 (1883). *Ex parte* Papin, 15 L. C. J. 334 (1871); 16 L. C. J. 319 (1872); Paige v. Griffith, 18 L. C. J. 119 (1873).

[9] Hodge v. R., *supra*.

[10] *Ibid.*

[1] R. v. Wason, 17 A. R. 221 (1890), reversing in effect R. v. Roddy, 41 U. C. Q. B. 291 (1877).

2. Any matter, even though of a local or private nature, which comes within § 91 does not come within this sub-section.[2]

3. A matter which is local or private is presumed to come within this sub-section.[3]

4. A statute (33 V. c. 47) of the Legislature of a Province (N.B.) authorizing the majority in a parish to raise by local taxation a subsidy for constructing a railway beyond that Province (which railway was already authorized by statute) is within the powers of the Provincial Legislature under this sub-section.[4]

5. A Provincial (Q.) Act (39 V. c. 52) empowering the City of Montreal to impose an annual tax on ferrymen or steamboat ferries does not interfere with navigation and shipping (§ 91, sub-section 10), and is valid under this sub-section.[5]

6. A Provincial (Q.) enactment (37 V. c. 57, § 3), empowering a local corporation to borrow money at any rate of interest, and to make arrangements allowing such interest either by selling below par obligations bearing a lower rate of interest, or by issuing them at par, bearing the agreed rate of interest is *intra vires* of the Provincial Legislature under this sub-section.[6]

7. A Provincial Legislature may give local corporations authority to borrow money at any rate of interest already legalized as to other persons having the right to borrow.[7]

8. A Provincial (Q.) Act (33 V. c. 58) to relieve a financially embarrassed society existing in a Province does not infringe on the rights of the Dominion Parliament under § 91, sub-section 21, but is legislation respecting a local matter in the Province under this sub-section and is valid.[8]

9. While the Dominion Parliament has power to regulate ferries between two Provinces or between a Province and foreign countries, a ferry wholly within a Province is a local or private matter within this sub-section and is entirely under the control of the Provincial Legislature.[9]

[2] Section 91, closing clause.

[3] L'Union St. Jacques v. Belisle, L. R. 6 P. C. 31 (1874).

[4] Dow v. Black, L. R. 6 P. C. 272 (1875).

[5] Longueuil v. Montreal, 15 S. C. R. 566 (1888).

[6] Royal Can. Ins. Co. v. Montreal Warehousing Co., 3 Q. L. N. 155 (1880).

[7] *Ibid.*

[8] L'Union St. Jacques v. Belisle, L. R. 6 P. C. 31 (1874).

[9] Longueuil v. Montreal, 15 S. C. R. 566 at pp. 573-4 (1888).

**10. A Provincial (N. B.) Act (33 V. c. 47) empowering inhabitants in a parish to raise by local taxation a subsidy to promote the construction of a Railway extending beyond the limits of the Province is legislation within this sub-section, and does not interfere with the rights of the Dominion respecting the excepted subjects in § 92, sub-section 10 (*a*), and is valid.[10]**

## EDUCATION.

SECTION 93 is entitled "Legislation respecting Education," and is as follows:—

In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union.

2. All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects, shall be, and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

3. Where in any Province a system of separate or dissentient schools exist by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education.

4. In case any such Provincial law as from time to time seems to the Governor-General in Council requisite for the due execution of the provisions of this section is not made, or in case any decision of the Governor-General in Council on any appeal under this section is not duly

[10] Dow v. Black, L. R. 6 P. C. 272 (1875).

executed by the proper Provincial authority in that behalf, then and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial laws for the due execution of the provisions of this section and of any decision of the Governor-General in Council under this section.

1. An Imperial Act (The English Medical Act, 31 V. c. 29), passed since Confederation providing for the registration of a practitioner thereunder in any colony on payment of the fees required, and also providing that the term "colony" shall include any of Her Majesty's possessions which have a Legislature, applies to Canada, and over-rides Provincial regulations (in R. S. O. 1877, c. 142), for the examination of applicants for registration, notwithstanding the fact that the Provinces of Canada are given exclusive power to legislate respecting education.[1]

This decision illustrates the principle that Imperial legislation can at all times override the enactments of a colony.

2. A Province may legislate regarding separate schools, provided the rights or privileges respecting denominational schools which class of persons had by law in the Province at confederation, are not prejudicially affected thereby.[2]

3. Under sub-section 3 of this section an appeal is given in respect of those decisions alone which are legislative acts or their equivalents, and not in respect of matters affecting the every day detail of the working school.[3]

4. In election matters separate schools have the same right of appeal to a county judge as public schools have.[4]

5. The provision contained in § 93, sub-section 1, protects those legal rights and privileges which existed in each Province at the Union by virtue of positive legal enactment, and not such as were enjoyed under exceptional and accidental circumstances and without legal right.[5]

6. A Provincial (N. B.) Act (34 V. c. 21) providing that the schools conducted thereunder should be non-sectarian, there

[1] R. v. The College of Physicians and Surgeons of Ontario. 44 U. C. Q. B. 564 (1879).

[2] Separate School Trustees of Belleville v. Grainger, 25 Gr. 570 (1878).

[3] *Ibid.*

[4] *Ibid.*

[5] *Ex parte* Renaud, 1 Pugs. 273 (1873).

being no denominational schools at the Union, and no class of persons having any rights or privileges respecting denominational schools at such time is valid, and the Board of Education cannot by any regulations affect the constitutionality of such Act.[6]

7. If such Board had made improper regulations, or had neglected to make proper regulations, the case falls within § 93, sub-section 4.[7]

8. A Provincial (Man.) Act (53 V. c 38) abolishing the denominational system of education, which was established since the union of Manitoba with the Dominion,[8] but which did not compel the attendance of pupils at public schools, and conferred no advantage other than that of free education, and left each denomination free to establish, maintain and conduct its own schools was not legislation contravening § 22 of the Act admitting Manitoba into the union, and which corresponds with sub-section 1 of this Act, except that it has the words " or Practice " inserted immediately preceding the sixth word from the end of the sub-section, and accordingly by-laws which authorized assessments under the Act were valid.[9]

9. Such an Act did not prejudicially affect any legal rights or privileges enjoyed by Roman Catholics before the Union, because it repealed Acts to the contrary passed after the Union.[10]

10. A Provincial (Manitoba) Act establishing a system of public schools entirely non-sectarian and supported by public taxation, and repealing former Acts passed after the Union establishing a denominational system of public education, prejudicially affects rights and privileges enjoyed by the Roman Catholics since the Union and an appeal lies to the Governor-General in Council under § 22 sub-section 3 of the Act providing for the admission of Manitoba into the Union (33 V. c. 3), which corresponds identically with sub-section 4 of this section, and remedial orders under such sub-section are made by supplemental rather than by repealing legislation.[1]

[6] *Ibid;* Maher v. Portland, 2 Cart. 486 (1874).

[7] *Ex parte* Renaud, 1 Pugs. 273 (1873).

[8] Manitoba came into the Dominion by virtue of 33 V. c. 3 (1870), being an Act to establish and provide for the Government of Manitoba. (Dom.)

[9] Winnipeg v. Barrett, Winnipeg v. Logan (1892), A.C. 445.

[10] *Ibid.*

[1] Brophy v. A. G. of Manitoba (1895), A.C. 202.

SECTION 94. Empowers the Dominion Parliament to render uniform any or all the Property and Civil Rights Laws in Ontario, Nova Scotia and New Brunswick, likewise the procedure in any or all the Courts in the Provinces, and it also provides that after such is done the Dominion Parliament's power respecting anything in the Statute effecting this change shall be unrestricted; but a condition precedent to an Act of this nature having effect in any Province is required, namely the enactment thereof by the Legislature of such Province.

**This has not yet been done.**

SECTION 95. Empowers the Legislature of each Province to make laws respecting Agriculture in the Province, also Immigration into the Province; while the Dominion Parliament may make laws respecting Agriculture or Immigration into all or any of the Provinces, and it also provides that Provincial Legislation in case of conflict is to be modified by that of the Dominion.

**This section provides for concurrent legislation on the parts of the Dominion Parliament and the Provincial Legislatures.**

PART 7 is entitled "Judicature," and comprises sections 96 to 101 inclusive.

SECTION 96. Empowers the Governor-General to appoint the Judges of the Superior, District and County Courts of each Province, except those of the Probate Courts of Nova Scotia and of New Brunswick.

**1. A Provincial (Q.) Act providing for the appointing of District Magistrates is valid, such Magistrate not being a District Judge within this sub-section.[2]**

**2. A Province cannot pass an Act authorizing the Lieutenant-Governor to remove a County Judge for incapacity or misbehaviour, nor pass an Act abolishing the Court of Imprachment (which existed before the Union) for the trial of charges against County Judges.[3]**

[2] R. v. Horner, 2 Steph. Dig. 450 (1876).

[3] *Re* Squier, 46 U. C. Q. B., 474 (1882).

The modes of removing County Court Judges are set forth in *Re Squier*, 46 U. C. Q. B. 474.

3. A Provincial (N.B.) Act (39 V. c. 5) passed since the Union provided for the establishment of Courts to try actions in certain cases before Commissioners appointed by the Lieutenant-Governor in Council, is valid because the Commissioners are not Judges but Justices of the Peace whose appointments the Provincial Legislatures can regulate.[4]

4. The rule is laid down in *In re Wilson* v. *McGuire*, 2 O. R. 118 (1883), that the Province can empower any officer it finds within its jurisdiction to execute its laws; and the fact that such officer is likewise a Dominion appointee is immaterial.

SECTION 97. Declares that until the laws respecting property and civil rights in Ontario, Nova Scotia and New Brunswick, and Court procedure in those Provinces are made uniform, the Judges of the Provincial Courts shall be selected from the respective Provincial bars.

The above laws not having been rendered uniform (see note to § 94) the alternative method of selecting the Judges provided by this section now prevails.

SECTION 98. Provides that the Quebec Court Judges shall be chosen from the Quebec bar.

SECTION 99. Fixes the Superior Court Judges tenure of office as during good behaviour, but renders them removable by the Governor-General on an address from the Senate and House of Commons to that effect.

In England the Judges are impeachable before Parliament, but in Canada the method provided for their removal is that fixed by this section.

As to the method of removing County Court Judges, see Note 2 to § 96, *supra*.

Section 100. Provides that the Dominion Parliament shall fix the salaries, allowances and pensions, of the Judges of the Superior, District and County Courts (except of those of the Probate Courts of Nova Scotia and New Brunswick,

[4] Ganong v. Bayley, 1 Pugs. & Burb., 324 (1877), see also § 92, sub-section 14, Note 16.

[5] Smith v. Hempstead, 16 L. C. J. 140 (1872).

[6] Clarkson v. Ryan, 17 S. C. R. 251 (1890).

likewise of those of the Admiralty Courts where they are paid by salary).

SECTION 101. Provides for the establishment by the Dominion Parliament of a general Appellate Court for, and any additional Courts in, Canada.

1. In 1878 was established the Supreme Court of Canada, having appellate jurisdiction from all the Provinces. That Court consists of a Chief Justice and 5 Puisne Judges.

2. The Dominion Parliament can confer authority on Courts and Judges in Canada to make orders for the examination of any witness or party respecting any civil or commercial matter pending before any British or Foreign tribunal, and a Dominion Act (31 V. c. 76), to this effect is valid.[5] But whether or not the British or Foreign tribunal will take advantage of such legislation, it is submitted, is a matter of international comity.

3. A Provincial (O.) Act (R. S. O. 1887, c. 42) having provided that in certain cases no appeal shall lie to the Supreme Court of Canada without special leave, does not bind the Supreme Court of Canada, because the Provincial Legislatures have jurisdiction over procedure in civil matters only in Provincial Courts, and not in Dominion Courts, the latter of which this is.[6]

By 58-9 V. c. 44 (1895), (Imp.) the Chief Justice of the Supreme Court of Canada is accorded a seat in the Judicial Committee of the Privy Council, which tribunal is the Court of last resort as far as the British Colonies are concerned. (This corresponds with the House of Lords which is the tribunal of last resort for the United Kingdom.)

The Supreme Court of Canada sits at Ottawa.

PART 8. Is entitled "Revenues, Debts, Assets, Taxation," and comprises sections 102 to 126 inclusive.

SECTION 102. Creates a Consolidated Revenue Fund for Canada out of all duties and revenues over which the various Legislatures before the Union had power of appropriation except those parts thereof which are reserved to the Provinces or are raised by special powers conferred by the B. N. A. Act.

See § 109, Note 2.

SECTION 103. Makes the expenses of collecting and managing such revenue (subject to audit) a first charge thereon.

SECTION 104. Makes the interest on the public debt of the several Provinces the second charge thereon.

SECTION 105. Fixes (till the Dominion Parliament shall alter it) £10,000 as the Governor-General's salary, and makes it the third charge thereon.

SECTION 106. Declares that subject to these charges thereon the Dominion Parliament shall apply this fund to the public service.

SECTION 107. Declares that all stocks, cash, bankers' balances, and securities for money, belonging to each Province at the time of the Union, except as otherwise provided in the B. N. A. Act shall belong to Canada, and be taken to reduce the respective Provincial debts as at the Union.

SECTION 108. Appropriates to Canada the Public Works and property of each Province enumerated in Schedule 3 to the Act.

See § 91, sub-section 12, Note 5.

See§ 109, Note 3.

1. A Dominion Act (37 V. c. 16), which authorized a transfer of a railway subject to an obligation on the part of Provincial Government at the time of the Union to a company, *quære* if it was *ultra vires* of the Dominion Parliament to extinguish the rights of the transferee under said agreement. (But it was held that no existing instrument was affected).[7]

2. The "Public Harbours" here referred to include all harbours including the bed and soil thereof, which the public have the right to use, and are not limited to such as at Confederation had been artificially constructed or improved at the public expense, and where a grant of part of the foreshore of a natural harbour used as such by the public was made by the Provincial Government of Prince Edward Island subsequent to the admission of that Province into the Union, such grant was held invalid.[8]

[7] Western Counties Railway Co. v. Windsor and Annapolis Railway Co., 7 A. C. 178 (1882).

[8] Holman v. Green, 6 S. C. R. 707 (1881). McDonald v. Lake Simcoe Ice and Cold Storage Co., 26 A. R. 411 (1899).

3. The following is Schedule 3.

Provincial public works and property to be the property of Canada.

1. Canals with lands and water power connected therewith.

2. Public harbours.

3. Lighthouses and piers, and Sable Island.

4. Steamboats, dredges and public vessels.

5. Rivers and lake improvements.

6. Railways and railway stocks, mortgages and other debts due by railway companies.

7. Military roads.

8. Custom houses, post offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.

9. Property transferred by the Imperial Government, and known as Ordnance Property.

10. Armouries, drill sheds, military clothing and munitions of war, and land set apart for general public purposes.

4. In *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*, 26 A. R. 411, at p. 421 (1899), it is pointed out that the Imperial Privy Council in "The Fisheries Case" (see § 91, sub-section 12, Note 5), "expressly abstained" from exhaustively defining a public harbour. But the McDonald case throws great light on the question. It was there held that a small bay in Lake Simcoe, containing a wharf, where, with the wharf-owner's permission, vessels called, there being no mooring ground, and little shelter, was not a public harbour. See the judgments therein; see also the exhaustive argument of W. Macdonald, Q.C., for the plaintiffs in that case in which all the authorities on the subject are collected and reviewed.

SECTION 109. Gives all lands, mines, minerals and royalties belonging to Upper and Lower Canada, Nova Scotia and New Brunswick at the Union, and sums due therefor to Ontario, Quebec, Nova Scotia and New Brunswick respectively subject to existing trusts and interests.

1. When by treaties in 1850 the Governor of Canada as representing the Crown and the Provincial Government obtained the cession from the Ojibeway Indians of lands occupied as Indian reserves, the beneficial interest therein passing to the Provincial Government, together with the liability to pay to the Indians perpetual annuities, such lands being within Ontario, the beneficial interest therein vested in Ontario by § 109 of the B. N. A. Act, 1867.

Such annuities having been capitalized, the Dominion assumed liability in respect thereof under §111, and thereafter the amounts were increased. Held, that liability for such increased amounts was not so attached to the ceded lands and their proceeds as to form a charge thereon in the hands of the Province under §109. They must be paid to the Dominion with recourse to Ontario and Quebec jointly under sections 111 and 112 in the same manner as the original annuities.[9]

2. Lands in a Province (O.) escheated to the Crown for failure of heirs belong to the Province and not the Dominion, revenue derived in such a way being casual (which is governed by § 109) and not general (which is governed by § 102.) Such revenue was before the Union subject to the disposal, not of the Crown but of the Canadian Legislature. It is as "Royalties" that escheats are considered under this section.[10]

3. This section gives to each Province the entire beneficial interest of the Crown in all lands within its boundaries, which, at the time of the union, were vested in the Crown, subject to such rights as the Dominion can maintain under sections 108 and 117. And the Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein. Where, in 1763 the Indians of certain tribes, had reserved to them as hunting grounds parts of lands unceded and unpurchased by the Crown, with a provision that purchases from them must be by the Crown, and not a private person; and in 1873 such lands situate in Ontario were for certain hunting and fishing rights surrendered to the Dominion Government for the Crown, it was held that the first tenure of the Indians depended on the good will of the Crown, and that at the Union such lands vested, by this section, in the Crown, subject to the Indian's title.[1]

4. Where public lands are conveyed by a Province (B.C.) to the Dominion, no implication arises that there is also a transfer by the Province of its interest in the revenues arising from the Crown's prerogative rights. The precious metals in, upon and under such lands belong to the Crown (not being incidents of the land) and under this section beneficially to the Province, and an intention to tranfer them must either be expressed or necessarily implied.[2]

[9] Attorney-General for the Dominion v. Attorney-General for Ontario; Attorney-General for Quebec v. Attorney-General for Ontario (1897), A. C. 199, reversing in part 25 S. C. R. 434.

[10] Attorney-General for Ontario v. Mercer, 8 A. C. 767 (1883).

[1] St. Catharines Milling and Lumber Co. v. The Queen, 14 A. C. 46 (1888).

[2] Attorney-General of British Columbia v. Attorney-General of Canada, 14 A. C. 295 (1889).

SECTION 110. Gives all assets connected with portions of the public debt of each Province as are assumed by such Province to that Province.

SECTION 111. Makes Canada liable for the several Provincial debts existing at the Union.

See § 109, Note 1.

SECTION 112. Makes Ontario and Quebec jointly liable to Canada for the excess of the debts of the Province of Canada above $62,500,000, the same to bear interest at five per cent. per annum.

See § 109, Note 1.

SECTION 113. Gives Ontario and Quebec jointly the assets set out in Schedule 4, being property belonging to the Province of Canada.

The following is the fourth schedule.
Assets to be the property of Ontario and Quebec conjointly.
Upper Canada Building Fund.
Lunatic Asylums.
Normal Schools.
Courts Houses in Alymer, Montreal, Kamouraska, Lower Canada.
Law Society, Upper Canada.
Montreal Turnpike Trust.
University Permanent Fund.
Royal Institution.
Consolidated Municipal Loan Fund, Upper Canada.
Consolidated Municipal Loan Fund, Lower Canada.
Agricultural Society, Upper Canada.
Lower Canada Legislative grant.
Quebec Fire Loan.
Temiscouata Advance Account.
Quebec Turnpike Trust.
Education—East.
Building and Jury Fund, Lower Canada.
Municipalities Fund.
Lower Canada Superior Education Income Fund.

SECTION 114. Fixes the liability of Nova Scotia to Canada as the excess of its public debt above $8,000,000, the same to bear interest at five per cent. per annum.

SECTION 115. Fixes the liability of New Brunswick to Canada as the excess of its debt above $7,000,000, the same to bear interest at five per cent. per annum.

SECTION 116. Provides that in case the public debts of Nova Scotia and New Brunswick do not at the Union amount, as above, to $8,000,000 and $7,000,000 respectively these Provinces are to receive half-yearly in advance, from the Dominion Government five per cent. per annum interest on the difference between such sums and their respective debts.

SECTION 117. Reserves to the Provinces all their public property not disposed of by the B. N. A. Act, subject to Canada's right to assume part thereof for fortifications or defence.

See § 109, Note 3.

SECTION 118. Provides for the annual payment by Canada of $260,000 to the Provinces to support their respective Governments and Legislatures, as follows:—

| | |
|---|---|
| Ontario | $80,000 |
| Quebec | 70,000 |
| Nova Scotia | 60,000 |
| New Brunswick | 50,000 |

and also 80 cents per head of population as found by each census, but in case of Nova Scotia and New Brunswick at this rate for not over 400,000 of a population; from which sums are to be deducted all sums due on the public debt of each Province above the amounts provided for in the B. N. A. Act.

SECTION 119. Gave New Brunswick $63,000 a year (payable half yearly) for 10 years from the Union, less five per cent. per annum interest on the amount which its debt is less than $7,000,000.

SECTION 120. Enacts that until the Dominion Parliament otherwise provides the form and manner of making these payments shall be ordered by the Governor-General in Council.

SECTION 121. Establishes Free Trade in natural products and manufactured articles among the Provinces.

SECTION 122. Continues until altered by the Dominion Parliament the customs and excise laws.

These laws have been frequently altered.

SECTION 123. Provides that where duties are leviable at the Union on goods in any two Provinces, such goods may be imported from one of them to the other on proof of payment of duty thereon in the exporting Province, together with the further duty leviable in the importing Province.

SECTION 124. Leaves unaffected by the B. N. A. Act New Brunswick's right to levy lumber dues as provided in R. S. N. B. c. 15, or amending Acts, but the other Provinces shall not be subject to such dues.

SECTION 125. Exempts from taxation all Dominion property.

SECTION 126. Forms a Provincial Consolidated Revenue Fund in each Province out of the parts of the duties revenues over which each Province had power of appropriation before the Union or as or by the B. N. A. Act reserved to the Provinces.

PART 9. Is entitled "Miscellaneous Provisions," and comprises sections 127 to 144, inclusive.

SECTION 127. Affected certain of the early Senators, but this section is repealed by The Statute Law Revision Act as spent.[3]

[3] 56 V. c. 14 (Imp.)

SECTION 128. Provides for the taking of the oath of allegiance, set out in Schedule 5 to the Act, by Senators, Members of Parliament, of the Legislative Council, and of the Legislative Assembly, before taking a seat. Every Senator, and each Quebec Legislative Councillor, shall take the declaration of qualification accompanying said oath of allegiance.

**The oath of allegiance is as follows:**

**"I, A. B., do solemnly swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria." (Or whomsoever the Sovereign may be.)**

**The declaration of qualification is in the terms of § 23 of the B. N. A. Act, except that it omits all reference to age and nationality.**

SECTION 129. Continues (except as the B. N. A. Act otherwise provides) all laws, Courts, judicial, administrative and ministerial officers in the four Provinces, subject to alteration by the proper authority.

**See § 41, Note 2.**

**See § 91, sub-section 2, Note 15.**

SECTION 130. Transfers to Canada all officers whose duties pertain to matters outside of those reserved to the Provinces. This is subject to change by the Dominion Parliament.

SECTION 131. Empowers the Governor-General (until the Canadian Parliament otherwise provides) to appoint all officers required for the execution of the B. N. A. Act.

SECTION 132. Gives the Dominion Parliament and Government all powers required for performing international obligations due by the Dominion, or by any Province as part of the Empire.

**The Imperial Extradition Act of 1870 is in force in Canada, notwithstanding this sub-section.[4]**

[4] **Ex parte Worms, 22 L. C. J. 109 (1876).**

SECTION 133. Establishes dual (English and French) languages in the Dominion Parliament, and Quebec Legislature, with privilege of using either language in pleadings or process of any Court of Canada established under the B. N. A. Act, or of any Court of Quebec.

**Both of these languages are employed in the Supreme Court of Canada.**

SECTION 134. Empowers each of the Ontario and Quebec Lieutenant-Governors (until the Ontario or Quebec Legislatures otherwise provide), to appoint his executive government officers and fix their, and their clerk's, duties.

SECTION 135. Transfers to such appointees the powers and duties vested in the existing executive officers, subject to change by the Legislatures.

SECTION 136. Enacts that subject to Legislative change, the Ontario and Quebec Great Seals shall be of the designs used respectively in Upper and Lower Canada prior to their Union in 1841.

SECTION 137. Extended the temporary Acts of the Province of Canada to the end of the next ensuing session of that body having power to legislate respecting such Acts.

**A temporary Act (28 V. c. 30) of the old Province of Canada empowered the Governor to appoint Police Magistrates. Held, a Province (O.) has power by this § and § 65 to enact legislation continuing same.[5]**

SECTION 138. Saves from invalidation a confusion in the use of Upper and Lower Canada after the Union instead of Ontario and Quebec in legal or other proceedings.

SECTION 139. Gives force to proclamations, under the Great Seal of Canada, issued before the Union, but to take effect after it.

[5] R. v. Reno and Anderson, 4 P. R. 281 (1868).

SECTION 140. Provides that any proclamation allowed by any Act of the Province of Canada before Confederation to be issued, may be issued thereafter by the Ontario or Quebec Lieutenant-Governor as its subject matter may require.

SECTION 141. Provides that until the Canadian Parliament otherwise enacts, the Penitentiary of Canada shall be that of Ontario and Quebec.

SECTION 142. Provides for an arbitration, and the appointment of three arbitrators, one for each of the Provinces, and one for the Dominion, to settle the division and adjustment of accounts between Upper and Lower Canada.

**No appointment made under this section can be revoked; and an award by two, though the third had affected to resign, was held valid.[6]**

SECTION 143. Provides for the division of books and documents of Upper and Lower Canada, between Ontario and Quebec, and also provides for the admission of extracts or copies therefrom, certified to by the official having charge of same, as evidence.

SECTION 144. Empowers the Quebec Lieutenant-Governor to constitute townships in the unsettled parts of Quebec.

PART 10. Consisted of Section 145 and was entitled "Intercolonial Railway."

SECTION 145. Provided for the commencement of a railway joining the St. Lawrence River with Halifax.

**This having been done many years since, this section is now of no further service and consequently it was repealed.[7]**

[6] *In re* Ontario and Quebec Arbitration, 4 Cart. 712 (1878).

[7] See The Statute Law Revision Act, 56-7 U. C. 14 (Imp.) (1893).

PART 11. Is entitled Admission of other Colonies, and contains sections 146 and 147, the closing sections of the Act.

SECTION 146. Provides for the admission into the Union of Newfoundland, Prince Edward Island, British Columbia, Rupert's Land and the North-West Territory, upon addresses from their own legislatures, together with an address from the Dominion Houses of Parliament.

**Of these Prince Edward Island, British Columbia and part of North-West Territory have been admitted into the Union. Their admission has been considered elsewhere.[8]**

SECTION 147. Provides for the increase in the Senate of four members each for Newfoundland or Prince Edward Island, should either of these Provinces be admitted, with, in case of Newfoundland's admission, a normal number of seventy-six, and maximum number of eighty-two, but Prince Edward Island is to be numbered with Nova Scotia and New Brunswick, and instead of the two latter Provinces each having 12 members,[9] the distribution is to be effected thus:—

| | |
|---|---|
| Nova Scotia ..... | 10 |
| New Brunswick ..... | 10 |
| Prince Edward Island ..... | 4 |
| | 24 |

without further increase except as is provided by § 26 of the B. N. A. Act.

[8] See Part I., at p. 61 *et seq.*, *supra*.

[9] See section 22, *ante*.

# SCHEDULES.

SCHEDULE I. to the Act enumerated the electoral districts of Ontario. But § 40 provided for their alteration by the Canadian Parliament, and such having been done, this Schedule is of no further use, and is consequently not reproduced.

SCHEDULE II. to the Act enumerates the fixed electoral districts of Quebec, which are 12 in number.

See § 82.

SCHEDULE III. to the Act enumerates the Provincial Public Works and Property which become the Property of Canada.

See notes to § 108.

SCHEDULE IV. to the Act enumerates the assets which becomes the joint Property of Ontario and Quebec.

See notes to § 113.

SCHEDULE V. to the Act contains the oath of allegiance, likewise the declaration of qualification for certain of the Legislators to make.

See notes to § 128.

## AMENDMENTS.

The British North America Act has been four times supplemented and amended, as follows:—

First, by 34-35 V. c. 28 (1871), empowering the Parliament of Canada to establish new Provinces in any territories included in Canada, to alter the limits of Provinces, and to provide for government in any territory not included in any Province. It also confirmed the doubtful Canadian legislation respecting the governing of Rupert's Land and the North-West Territory, and establishing the Province of Manitoba (32-3 V. c. 3; 33 V. c. 3; Canada). It too prevented Canada from changing either this legislation respecting Manitoba, or any future legislation establishing other Provinces, except to the extent of changing the Provincial boundaries. But the right to make laws respecting the qualification of electors and members of the Manitoba Legislative Assembly it gave to the Manitoba Legislature.

Second, by 38-9 V. c. 38 (1875), which substituted a new section for § 18 of the B. N. A. Act, and confirmed 31 V. c. 24 (Can.), being an Act to provide oaths to witnesses being administered in certain cases for the purpose of either House of Parliament, from its assent.

Third, by 49-50 V. c. 35 (1886), empowering the Dominion Parliament to provide for representation of the Territories (not included in any Province) in the Senate and Commons. It also validated any prior Act to this effect.

Fourth, by 56 V. c. 14 (1893), the Statute Law Revision Act, which repealed some of the obsolete and spent sections of the B. N. A. Act, 1867—an Act to which reference has been made in this treatise wherever any of its provisions applied.

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